# TRANSCRIPT OF RECORD.

SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, 1904.

No. 32.

JOHN SOMIC AND DANIEL W. HARDING, APPELLANTS,

vs.

MYRTLE GULETT.

APPEAL FROM THE SUPREME COURT OF THE TERRITORY OF OKLAHOMA.

FILED MARCH 9, 1904.

(16,909.)

(18,069.)

# SUPREME COURT OF THE UNITED STATES.

## OCTOBER TERM, 1901.

No. 263.

JOHN ROMIG AND DANIEL W. HARDING, APPELLANTS,

*vs.*

MYRTLE GILLETT.

APPEAL FROM THE SUPREME COURT OF THE TERRITORY OF OKLAHOMA.

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1 In the Supreme Court of the Territory of Oklahoma, before the Honorable Bayard T. Hainer, Associate Justice of said Court, in Chambers.

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|---|---|
| JOHN ROMIG and DANIEL W. HARDING, Plaintiffs in Error, *vs.* MYRTLE GILLETT, Defendant in Error. | Petition for Order Allowing Second Appeal and for Supersedeas by Plaintiffs in Error. |

John Romig and Daniel W. Harding, plaintiffs in error, in the above-entitled cause, feeling themselves aggrieved by the judgment entered in this court on the 30th day of June, 1900, come now by C. R. Buckner and L. N. Houston, their attorneys, and petition this court for an order allowing said plaintiffs in error to prosecute a second appeal to the honorable Supreme Court of the United States, under and according to the laws of the United States, in that behalf made and provided, and also that an order be made fixing the amount of security which the plaintiffs in error shall give and furnish upon said appeal, and that upon the giving of such security, all further proceedings in this court shall be suspended and stayed until the determination of said appeal by the United States Supreme Court.

Petitioners further stated that on to wit the 14th day of November, 1900, the former appeal allowed in this cause, by this court, was dismissed by the Supreme Court of the United States, under rule nine of its rules and practice, for the reason that the plaintiffs in error failed to docket their said appeal in said court within thirty days from the issuance of the citation to the defendant in error, by the hon. chief justice of the supreme court of Oklahoma Territory, and that said appeal was never disposed of upon its merits.

2 Wherefore, petitioners pray that a second appeal be allowed in said cause, and that the amount of the supersedeas bond be fixed by this court, and that the proceedings under the judgment of this court or the mandate of the Supreme Court of the United States, be stayed upon the filing of said bond, and for all other proper relief.

C. R. BUCKNER,
L. N. HUSTON,
*Attorneys for Petitioners.*

[Endorsed:] 953. John Romig and Daniel W. Harding, *vs.* Myrtle Gillett. Petition for order allowing second appeal and supersedeas. Filed Jan. 23 1901 Benj. F. Hegler, clerk supreme court. By Jessie Pardoe, deputy. Ent.

3 In the Supreme Court of the Territory of Oklahoma.

JOHN ROMIG and DANIEL W. HARDING, Plaintiffs in Error,
*vs.*
MYRTLE GILLETT, Defendant in Error.
} Affidavit of Value.

TERRITORY OF OKLAHOMA, *County of Garfield,* } ss:

William N. Purmont and Julius Grieser, being duly sworn, on oath depose and say that they are well acquainted with the east half of the northeast quarter of section eighteen, in township twenty-two, range six west of the Indian meridian, in Oklahoma Territory, and affiants say that they are well acquainted with the reasonable and actual value of said land, and affiants do say that said land, excepting therefrom a strip of eighty feet wide off of the west side, extending from the north to the south, boundary of said land, which is not considered, that the remainder of said land, with the appurtenances thereto, is now reasonably worth the sum of five thousand five hundred dollars.

Affiants further say that John Romig now has or claims no title to said land. That the above land is in controversy in the above case and is worth said sum exclusive of costs.

WILLIAM N. PURMONT.
JULIUS GRIESER.

Subscribed and sworn to before me this 24th day of January, 1901.

[Seal District Court, Territory of Oklahoma.]

J. P. RENSHAW,
*District Clerk,*
By J. W. SPROAT, *Deputy.*

Filed Jan. 24, 1901.

BENJ. F. HEGLER,
*Clerk Supreme Court,*
By JESSIE PARDOE, *Deputy.*

4 In the Supreme Court of the Territory of Oklahoma.

JOHN ROMIG and DANIEL W. HARDING, Plaintiffs in Error,
*vs.*
MYRTLE GILLETT, Defendant in Error.
} Affidavit of Value.

TERRITORY OF OKLAHOMA, *County of Garfield,* } ss:

August Messall, being duly sworn, on oath depose- and says that he is well acquainted with the east half of the northeast quarter of section eighteen, in township twenty-two, range six west of the Indian meridian, in Oklahoma Territory, and affiants say- that *they*

are well acquainted with the reasonable and actual value of said land, and affiants do- say that said land, excepting therefrom a strip of eighty feet wide off of the west side, extending from the north to the south, boundary of said land, which is not considered, that the remainder of said land, with the appurtenances thereto, is now reasonably worth the sum of fifty-five hundred ($5,500.00) dollars.

Affiants further say- that John Romig now has or claims no title to said land, that the above land is in controversy in the above case and is worth said sum exclusive of costs.

AUGUST MESSALL.

Subscribed and sworn to before me this 24th day of January, 1901.

[Seal District Court, Territory of Oklahoma.]

J. P. RENSHAW,
*District Clerk,*
By J. W. SPROAT, *Deputy.*

Filed Jan. 24, 1901.

BENJ. F. HEGLER,
*Clerk Supreme Court,*
By JESSIE PARDOE, *Deputy.*

[Endorsed:] 953. John Romig and Daniel W. Harding *vs.* Myrtle Gillett. Petition for order allowing second appeal and affidavits of value. Filed Jan. 24 1901. Benj. F. Hegler, clerk supreme court. By Jessie Pardoe, deputy. Ent.

5 In the Supreme Court of the Territory of Oklahoma, before Hon. Bayard T. Hainer, Associate Justice, at Chambers.

JOHN ROMIG and DANIEL W. HARDING, Plaintiffs in Error,
*vs.*
MYRTLE GILLETT, Defendant in Error.
} Order Allowing Second Appeal.

Now, to wit: on this 22nd day of January, 1901, upon motion of C. R. Buckner and L. N. Houston, Esqs., counsel for John Romig, and Daniel W. Harding, plaintiffs in error, and on filing the petition of said John Romig and Daniel W. Harding, for an order allowing a second appeal in this cause, together with an assignment of errors,

And it appearing that the former appeal taken in this cause and allowed by the Hon. John H. Burford, chief justice of this court, was dismissed by the Supreme Court of the United States, under rule nine of its rules of practice, without adjudgment upon the merits of said cause, and for the reason that said appeal was not docketed in said court within thirty days from the issuance of the citation to the defendants in error,

It is by me ordered that a second appeal be, and it is hereby allowed to the Supreme Court of the United States of America, from the judgment of this court, rendered in the above-entitled cause on, to wit, the 30th day of June, 1900, said judgment being a final judg-

ment in said cause, and it is further ordered that the amount of the supersedeas bond upon said appeal be and the same is hereby fixed at the sum of two thousand dollars, and that upon the giving of said bond, with good and sufficient sureties, all proceedings under the judgment of this court or under the mandate of the Su-
6 preme Court of the United States, dismissing the former appeal, be and the same are hereby stayed, pending the final disposition of this appeal in the Supreme Court of the United States.

Dated at Perry, in the Territory of Oklahoma, this January 22nd, A. D. 1901.

BAYARD T. HAINER,
*Associate Justice of the Supreme Court of the Territory of Oklahoma.*

[Endorsed:] 953. Order allowing second appeal. John Romig and Daniel W. Harding, *vs.* Myrtle Gillett. Filed Jan. 23 1901. Benj. F. Hegler, clerk supreme court. By Jessie Pardoe, deputy. Ent.

7 UNITED STATES OF AMERICA, } ss:
*Territory of Oklahoma,* }

In the Supreme Court of the United States.

JOHN ROMIG and DANIEL W. HARDING, Appellants,
*vs.*
MYRTLE GILLETT, Appellee. } Citation.

The President of the United States to Myrtle Gillett, Greeting:

You are hereby cited and admonished to be and appear at the Supreme Court of the United States, to be holden at the city of Washington, D. C., within thirty days from the date hereof, pursuant to an order allowing a second appeal entered in the clerk's office of the supreme court of the Territory of Oklahoma, from said court to the Supreme Court of the United States of America, in that certain action numbered 953, in which Daniel W. Harding is complainant and appellant and you are respondent and appellee, to show cause if any there be why the decree rendered against the said complainant and appellant, as in the order allowing an appeal mentioned, should not be reversed, and why speedy justice should not be done to the parties in that behalf.

Witness the Honorable Bayard T. Hainer, justice of the supreme court of the Territory of Oklahoma this 22nd day of January, A. D. 1901.

BAYARD T. HAINER,
*Associate Justice of the Supreme Court of the Territory of Oklahoma.*

[Seal Supreme Court, Territory of Oklahoma.]

Attest: BENJ. F. HEGLER,
*Clerk of said Court.*

8 Service of the within citation and receipt of a copy thereof admitted this 8th day of Feb., A. D. 1901.

GEO. P. RUSH,
*Solicitor and Attorney for Myrtle Gillett, Appellee and Respondent in the Above Case.*

Filed Feb. 9 1901.

BENJ. F. HEGLER,
*Clerk Supreme Court,*
By —— ——, *Deputy.*

[Endorsed:] Original 953 John Romig and Daniel W. Harding *vs.* Myrtle Gillett Citation Filed Jan. 23 1901 Benj. F. Hegler clerk supreme court. By Jessie Pardoe deputy. Ent.

9 In the Supreme Court of the United States, — Term, 1901.

JOHN ROMIG and DANIEL W. HARDING, Appellants,
*vs.*
MYRTLE GILLETT, Appellee.

*Assignment of Errors on Appeal.*

Come now John Romig and Daniel W. Harding, appellants, by their counsel and respectfully represent that they feel themselves aggrieved by the proceedings, order and judgment of the supreme court of the Territory of Oklahoma, in the above-entitled cause, and assign error- therein as follows:

First. The court erred in its finding of fact and conclusions of law in rendering judgment in the supreme court of Oklahoma Territory, affirming the findings of fact and conclusions of law and the judgment of the district court of Garfield county, in the fifth judicial district, in the Territory of Oklahoma.

That said findings of fact and conclusions of law are erroneous in this:

(*a.*) The court had no jurisdiction herein, to render a judgment for possession of the land in controversy and evict Daniel W. Harding, an innocent purchaser for a valuable consideration.

(*b.*) The court had no jurisdiction upon the motion of Myrtle Gillett to eject and evict the mortgagor or those holding under him, from possession of said land (the mortgage providing for such possession) the remedy of Myrtle Gillett being by petition to redeem said lands.

10 (*c.*) The court erred in holding the judgment of the district court of Garfield county, Oklahoma Territory, rendered in this cause, void.

Second. The court erred in dispossessing the appellants of their property (in a summary manner) without due process of law.

Third. The court erred in rendering judgment depriving the appellants of their possession of the lands without first requiring that they be paid for their improvements, the amount due on their

mortgage, and the amount they have had to expend for the taxes on said land.

Fourth. The court erred in considering evidence *de hors* the record in this cause.

Fifth. The court erred in holding that the service in this cause was not sufficient to give the court jurisdiction herein.

Sixth. The proceedings and judgment of the court are contrary to the law of the case.

Seventh. The proceedings and judgment of the court are contrary to the evidence in this cause, in that there was no evidence introduced to show a right of possession in Myrtle Gillett.

Eighth. The court erred in refusing the appellants a rehearing in this cause.

Wherefore, the said appellants, John Romig and Daniel W. Harding pray this honorable court to examine and correct the errors assigned, and for a reversal of the judgment of the supreme court of Oklahoma Territory in the above-entitled cause.

JOHN ROMIG AND
DANIEL W. HARDING,
By L. N. HUOSTON AND
C. R. BUCKNER,
*Their Attorneys.*

11 In the Supreme Court of Oklahoma.

JOHN ROMIG and DANIEL W. HARDING, Plaintiffs in Error,
*vs.*
MYRTLE GILLETT, Defendant in Error. } Bond.

Know all men by these presents: That we, Daniel W. Harding, as principal and William N. Purmont, and Julius Grieser, and August Messall as sureties, are held and firmly bound unto Myrtle Gillett, her executors, administrators, or assigns, in the sum of two thousand dollars, to which payment well and truly to be made, we bind ourselves, our heirs, executors and administrators, jointly and severally by these presents.

Sealed with our seals and dated this 24th day of January, 1901.

Whereas, lately at a session of the supreme court of the Territory of Oklahoma, in a suit pending in said court between John Romig and Daniel W. Harding, plaintiffs in error, and Myrtle Gillett, defendant in error, a final decision was rendered against the said John Romig and Daniel W. Harding, affirming the judgment of the district court of Garfield county, Oklahoma Territory, and the said Daniel W. Harding having obtained the allowance of an appeal, and filed a copy thereof in the clerk's office of said court to reverse the decree in the aforesaid suit, and a citation directed to the said Myrtle Gillett, citing her and admonishing her to be and appear at the Supreme Court of the United States, at Washington, D. C., within 30 days from service thereof.

Now, the condition of the above obligation is such that if the said Daniel W. Harding shall prosecute said appeal to effect and answer

all damages and costs if he fails to make his plea good, then the above obligation to be void; else to remain in full force and virtue.

DANIEL W. HARDING. [SEAL.]
WILLIAM N. PURMONT. [SEAL.]
JULIUS GRIESER. [SEAL.]
AUGUST MESSALL. [SEAL.]

Approved to operate as a supersedeas by—

BAYARD T. HAINER,
*Associate Justice of the Supreme Court of the Territory of Oklahoma.*

12 TERRITORY OF OKLAHOMA, } ss:
*Garfield County,* }

I, the undersigned surety on the above undertaking, do solemnly swear that I am a resident of said county and Territory, and that I am worth twenty-five hundred ($2,500.00) dollars, over and above all exemptions, debts and liabilities. So help me God.

JULIUS GRIESER.

Subscribed and sworn to before me this 24th day of January, 1901.

J. P. RENSHAW, *Dist. Clerk,*
[SEAL.] By J. W. SPROAT, *Deputy.*

TERRITORY OF OKLAHOMA, } ss:
*Garfield County,* }

I, the undersigned surety on the above undertaking, do solemnly swear that I am a resident of said county and Territory, and that I am worth three thousand ($3,000.00) dollars, over and above all exemptions, debts and liabilities. So help me God.

WILLIAM N. PURMONT.

Subscribed and sworn to before me this 24th day of January, 1901.

J. P. RENSHAW,
*District Clerk,*
[SEAL.] By J. W. SPROAT, *Deputy.*

TERRITORY OF OKLAHOMA, } ss:
*Garfield County,* }

I, the undersigned surety on the above undertaking, do solemnly swear that I am a resident of said county and Territory, and that I am worth two thousand ($2,000.00) dollars, over and above all exemptions, debts and liabilities. So help me God.

AUGUST MESSALL.

Subscribed and sworn to before me this 24th day of January, 1901.

J. P. RENSHAW, *Dist. Clerk,*
[SEAL.] By J. W. SPROAT, *Deputy.*

13 In the Supreme Court of the Territory of Oklahoma.

Before Hon. Bayard T. Hainer, associate justice, in chambers.

DANIEL W. HARDING and JOHN ROMIG, Appellants,
*vs.*
MYRTLE GILLETT, Appellee.
} Supersedeas.

Now, to wit, on this 24th day of January A. D. 1901, the appellants Daniel W. Harding and John Romig, having perfected their appeal from the judgment rendered against them in the above cause by the supreme court of the Territory of Oklahoma, to the Supreme Court of the United States of America, and now present their bond to stay proceeding under said judgment pending said appeal for approval; and it appearing that said supersedeas bond is regular and sufficient,

It is therefore ordered, considered and adjudged that all proceeding- under said judgment in the supreme court of the Territory of Oklahoma in the above cause, including the mandate from said court, and all proceedings in the lower court be and they are by this order superseded and stayed pending the appeal of said Harding and Romig to the Supreme Court of the United States, and said supersedeas bond is hereby approved, and the mandate to the lower court recalled.

Witness my hand and seal of said court this 24th day of January A. D. 1901.

BAYARD T. HAINER,
*Associate Justice of the Supreme Court of Oklahoma Territory.*

14 In the Supreme Court of Oklahoma Territory.

JOHN ROMIG and DANIEL W. HARDING, Plaintiffs in Error,
*vs.*
MYRTLE GILLETT, Defendant in Error.

*Petition in Error.*

Comes John Romig and Daniel W. Harding, the plaintiffs in error, and complain of the defendant in error, Myrtle Gillett, and state that at the May term 1899, of the district court of Garfield county, Oklahoma Territory, Myrtle Gillett recovered an order or judgment by the consideration of said court against John Romig and Daniel W. Harding, upon a motion pending in said court to vacate and set aside a judgment in which John Romig was plaintiff and Don A. Gillett and Myrtle Gillett were defendants, in a foreclosure of a mortgage on the following real estate to wit; the east half of the northeast quarter section eighteen, township twenty-two north of range six west L. M., save and except a strip 80 feet wide off from the west side of said tract, from the north boundary to the south boundary.

A certified transcript of all the orders, journal entries, and original

papers in case-made, duly certified, is hereto attached, marked "Exhibit A" and made a part of this petition in error, and the said John Romig and Daniel W. Harding state that there is manifest error in said record and proceedings in this:

First.

The findings and judgment of the court are contrary to the law.

Second.

The judgment and findings of the court are contrary to the evidence in the cause.

15 Third.

The court had no jurisdiction under the pleadings to render a judgment for possession of the land in controversy in this cause.

Fourth.

The court had no jurisdiction to try and render judgment under the pleadings in this cause.

Fifth.

The court erred in overruling the motions for a new trial in this cause.

Sixth.

The court erred in overruling the motions of John Romig and Daniel W. Harding to strike from the files the motion of Myrtle Gillett to vacate the judgment theretofore rendered in the cause of John Romig *vs.* Don Gillett and Myrtle Gillett.

Seventh.

The court erred in entertaining the motion of Myrtle Gillett in this cause.

Wherefore, the plaintiffs in error pray that said judgment so rendered may be reversed, set aside and held for naught, and that a judgment be ordered to be rendered in favor of the plaintiffs in error, John Romig and Daniel W. Harding, and against the defendant in error upon the facts herein, and that the defendant's motion be dismissed, and that the plaintiffs in error be restored to all rights they have lost by the rendition of said judgment, and such other relief as justice and equity may demand.

D. D. TEMPLE,
L. N. HOUSTON, AND
BUCKNER & SONS,
*Att'ys for Plaintiff in Error.*

16 In the District Court for Garfield County, Oklahoma Territory.

MYRTLE GILLETT, Plaintiff,
*vs.*
JOHN ROMIG and DANIEL W. HARDING, Defendants.

*Case-made.*

Be it remembered that on the 11th day of March 1896, John Romig filed in the district court of Garfield county, Oklahoma Territory, his petition, together with the exhibits for foreclosure of a mortgage. Which petition and exhibits are in words and figures as follows; (That thereafter on the — day of May 1898 Myrtle Gillett filed her motion to vacate the judgment rendered in favor of John Romig, from the order rendering said judgment on which motion this appeal is prosecuted.)

17 In the District Court of Garfield County, Oklahoma Territory.

JOHN ROMIG, Plaintiff,
*vs.*
DON A. GILLETT and MYRTLE GILLETT, Defendants. } Petition. Case No. —.

The said John Romig, plaintiff, complains of the said Don A. Gillett and Myrtle Gillett and says that on the second day of February, A. D. 1895, the said Don A. Gillett executed and delivered to this plaintiff his certain promissory note in writing of that date whereby, for value received, he promised to pay to the order of the said plaintiff in two years after date thereof the sum of seven hundred dollars ($700.00) with interest at the rate of 12 per cent. per annum until paid; interest payable semi-annually in advance. A copy of said note is hereto attached, marked "Exhibit A," and made a part of this petition.

That said Don A. Gillett, by the terms of said note agreed that if default should be made in the payment of any of the said interest, or any portion thereof, after the same became due and payable, then all of said note should become at once due and payable without further notice, and were given for an actual loan of seven hundred dollars ($700.00) said loan being secured by a mortgage on real estate duly recorded.

That for the purpose of securing the payment of said note and interest, and the sums of money to become due thereon the said Don A. Gillett at the county of Garfield and Territory of Oklahoma on the said second day of February, A. D. 1895, executed and delivered unto this plaintiff his certain mortgage deed in writing of that date, and thereby did grant, bargain, sell and convey unto said plaintiff his heirs, executors, administrators and assigns all the following-described real estate situated in the county of Garfield and Territory of Oklahoma, to wit:

18 The east half of the northeast quarter, of section eighteen, township twenty-two, range six west of the Indian meridian.

That said mortgage deed contained a certain condition provided in substance that if said party of the first part, Don A. Gillett, shall pay or cause to be paid to the said plaintiff, his heirs or assigns, said sum of money in the above-described note, and attached to plaintiff's petition, together with the interest thereon according to the terms and tenor of the same, then these presents shall be wholly discharged and void, otherwise shall remain in full force and effect, but if such sum or sums of money or any part thereof, or any interest thereon, when the same is due, and if the taxes and assessments of every nature which are or may be assessed and levied against said premises or any part thereof when the same are by law due and payable, then the whole of said sum of sums, with the interest thereon, shall become due and payable at once, and the said plaintiff or his assigns, executors or administrators shall be entitled to said premises.

That said mortgage deed was duly filed for record in the office of the register of deeds in and for said county of Garfield, in the Territory of Oklahoma on the second day of February, A. D. 1895, at three o'clock, p. m. of said day, and was duly recorded on the same day in Book Two, on page 89.

A copy of said mortgage is hereto attached, marked "Exhibit B" and made a part of this petition.

That said Don A. Gillett and his assigns has failed and neglected to pay the semi-annual interest on said note in advance when the same became due on the second day of February, 1896, but has made default, which default has continued to this day, by reason whereof the whole of the debt secured by said mortgage has become due and payable, and said plaintiff, John Romig, has declared, and does declare that the same is now due and payable.

19 That there is now due to the plaintiff on said indebtedness note and mortgage the sum of seven hundred and forty-nine dollars ($749.00) with interest thereon from the ninth day of March, A. D. 1896, at the rate of twelve per cent. (12%) per annum.

And said note further provides that if it is collected by suit an attorney's fee of 10% may be taxed as costs in said suit.

That by reason of the default so as aforesaid made in the payment of said interest and indebtedness the condition of said mortgage has been broken, and said mortgage deed has become absolute.

Plaintiff further states that the said defendant Myrtle Gillett has, or claims to have some interest or lien on said premises, or part thereof, and if any she may have, it is junior, inferior, and subject to plaintiff's mortgage deed.

Wherefore, said plaintiff prays judgment against said defendant, Don A. Gillett, for the sum of seven hundred and forty-nine dollars ($749.00) with interest thereon at the rate of 12% per annum from the 9th day of March, A. D. 1896, and for the further sum of seventy dollars as attorney fees and costs of suit.

And that said mortgage may be foreclosed, that the lien, claim interest, estate and equity of redemption of the said defendants if

any they have in and to the said premises may be settled and determined, and that said plaintiff may be adjudged to have the first lien and claim on the said premises; that said mortgaged premises may be ordered to be sold according to law, and the proceeds arising from said sale applied to the payment of said indebtedness due said plaintiff; that said defendants may be forever barred and foreclosed of and from all right, title, estate, interest, property and equity of redemption in or to said premises or any part thereof, and that said plaintiff may have such other and further relief as is just and proper.

D. D. TEMPLE,
*Attorney for Plaintiff.*

20 *Præcipe.*

The clerk of said court will issue summons in the above-entitled action for the said defendants, Don A. Gillett and Myrtle Gillett, directed to the sheriff of Garfield county, and make the same returnable according to law.

D. D. TEMPLE,
*Attorney for Plaintiff.*

Filed December 21st, 1900.

BENJ. F. HEGLER,
*Clerk Supreme Court,*
By M. E. KETSCH, *Deputy.*

21 Copy.

This indenture, made this 2nd day of February, A. D., 1895, between Don A. Gillett, of O., Garfield county, in the Territory of Oklahoma, of the first part, and John Romig, of O., Garfield county, in the Territory of Oklahoma, of the second part;

Witnesseth, that said party of the first part in consideration of the sum of $700.00, seven hundred dollars, the receipt of which is hereby acknowledged, does by these presents grant, bargain, sell and convey unto said party of the second part his heirs and assigns, all the following-described real estate, situated in O., Garfield county and Territory of Oklahoma, to wit:

The east one-half, (E. ½), of northeast — (N. E. ¼) of sec eighteen (18) township twenty-two (22) north of range six (6) west of Indian meridian save and except a strip of land eighty feet wide off of the west side of said tract of land from *to* the north to the south boundary thereof, containing eighty acres M. L. less said strip of 80 ft.

To have and to hold the same, together with all and singular the tenements, hereditaments and appurtenances thereunto belonging, or in anywise appertaining, forever:

Provided, always, and these presents are upon this expressed condition, that whereas said Don A. Gillett has this day executed and delivered one certain promissory note in writing to said party of the second part, of which the following is a true copy.

$700.00. ENID, O. T., *February 2nd*, 1895.

Two years after date we or either of us promise to pay to the order of John Romig, seven hundred dollars at Enid State bank *at Enid State bank* in Enid O. T. with interest from date at rate of 12 per cent. per annum, payable semi-annually in advance. The endorsers, signers, and guarantors hereof severally waive presentation for payment without notice of protest, notice of non-payment of this note as well as all diligence on the part of the payors or their assignors in attempting to collect the same and all sureties, indorsers, signers, and guarantors agree that the time of pay-
22 ment may be extended without notice to them or their consent.

It is also agreed that if the note is collected by suit an attorney's fee of 10 per cent. may be taxed as costs.

It is also agreed that the party of the 2nd part will accept payment of this note if paid promptly at end of 1st year on 2nd day of February, 1896. Otherwise to run for the full 2 years.

Now, if said party of the first part shall pay or cause to be paid to said party of the second part his heirs or assigns, said sum of money in the above-described note mentioned together with the interest thereon, according to the terms and tenor of the same, then these presents shall be wholly discharged and void, and otherwise shall remain in full force and effect. But if said sum or sums of money, or any part thereof or any interest thereon, is not paid when the same is due, and if the taxes and assessments of every nature which are, or may be, assessed and levied against said premises or any part thereof, are not paid when the same are by law made due and payable, then the whole of said sum or sums, and interest thereon, shall, and by these presents — become due and payable, and said party of the second part shall be entitled to the possession of said premises.

In witness whereof, the said party of the first part has hereunto set his hand the day and year first above written.

DON A. GILLETT.

EXHIBIT A.

23 TERRITORY OF OKLAHOMA, } *ss:*
*Garfield County,* }

Before Vernon W. Whiting, a notary public in and for the above-named county and Territory, on this 2nd day of February, 1895, personally appeared Don G. Gillett, *and* to me known to be a single person, and executed the above conveyance of lands, and each for himself acknowledged the execution thereof, to be his free and voluntary act for the purpose named.

Witness my hand and official seal the date above written.

VERNON W. WHITING,

[SEAL.] *Notary Public.*

My commission expires Sept. 22, 1897.

24 ENID, O. T., *February 2nd*, 1895.

Two years after date, we, or either of us, promise to pay to the order of John Romig, seven hundred dollars, at Enid State bank, in Enid, O. T., with interest from date at the rate of 12 per cent. per annum, payable semi-annually in advance.

The indorsers, signers and guarantors hereof severally waive presentation for payment, protest, notice of protest and notice of non-payment of this note, as well as diligence on the part of the payees or their assigns in attempting to collect the same, and all sureties, indorsers, signers and guarantors agree that the time of payment may be extended without notice to them or their consent. It is also agreed that if this note is collected by suit an attorney's fee of 10 per cent. may be taxed as costs.

It is also agreed that John Romig will accept payment of this note if paid promptly at end of first year, Feb. 2nd, 1896, otherwise to run for the full two years.

DON A. GILLETT.

Endorsement on back: $42.00. Enid, O. T., Feb. 2, 1895. Rec'd on this within note forty-two dollars int. from Feb. 2nd to Aug. 2nd, 1895. John Romig. $42.00. Enid, O. T. Aug. 10, '95. Rec'd on the within note forty-two dollars int. from Aug. 2 to Feb. 2d, 1896. John Romig.

Endorsed as follows, to wit: # 424. John Romig *vs.* Don A. Gillett, *et al.* Petition in foreclosure. Filed this the 11th day of March, 1896. J. C. McClelland, clerk. D. D. Temple, att'y for plaintiff.

25 That on the 12th day of March, 1896, the said John Romig, caused to be issued, by the clerk of the district court, a summons, which summons together with the returns thereon, is in words and figures as follows:

THE TERRITORY OF OKLAHOMA, } ss:
*Garfield County,* }

The Territory of Oklahoma to the sheriff of Garfield county, Greeting:

You are hereby commanded to notify Don A. Gillett and Myrtle Gillett that they have been sued by John Romig in the district court of Garfield county, Oklahoma Territory, and that they must answer the petition of the said plaintiff, John Romig, filed against them in the clerk's office of said court, on or before the 13th day of April, 1896, or said petition will be taken as true, and judgment rendered accordingly.

You will make due return of this summons, on or before the 23d day of March, 1896.

Given under my hand and the seal of said court, this 12th day of March, 1896.

[SEAL.] J. C. McCLELLAND, *Clerk.*

Endorsed as follows, to wit: Suit brought for foreclosure of mortgage. If the defendant fail to answer, judgment will be taken for the sum of $749.00 with interest at the rate of 12 per cent. per annum from the 9th day of March 1896, and costs of suit. J. C. McClelland, clerk. I received this summons on the 12th day of March, 1896, at 3 o'clock p. m. and executed the same in my county by a true copy of the within summons, with all the indorsements thereon. The within-named Don A. Gillett and Myrtle Gillett not found in Garfield Co., O. T. W. E. Thralls, sheriff, by D. D. Hoag, under sheriff, deputy.

26 Endorsed as follows, to wit: No. 424. Summons. John Romig *vs.* Don A. Gillett *et al.* Issued March 12, 1896. Returnable March 23, 1896. Answer due April 13, 1896. Filed ——, 189–. —— —— clerk. By —— —— deputy. —— —— attorney for plaintiff. I hereby certify the within to be a true copy of the original summons now in my possession, with all the endorsements thereon, this — day of —— 189–. —— —— sheriff *if* Garfield county. By —— —— under sheriff. Sheriff's fees. Serving summons, first person, — additional persons, not found Cop- of summons, $.10 Mileage — miles Total $— —— —— sheriff. By —— —— under sheriff.

That on the 2nd day of June 1896, the said John Romig filed in the district court, his affidavit for notice of summons, by publication, which affidavit is in words and figures as follows:

27 *Affidavit for Publication.*

TERRITORY OF OKLAHOMA, } *ss:*
*Garfield County,* }

In the District Court in the County and Territory Aforesaid.

JOHN ROMIG, Plaintiff,
*vs.*
DON A. GILLETT and MYRTLE GILLETT, Defendants. } Affidavit.

D. D. Temple being duly sworn according to law, says that he is the attorney for the above-named plaintiff, and that on the — day of March, 1896, said plaintiff filed in the district court aforesaid, a petition against said defendants showing that said defendant Don A. Gillett heretofore executed and delivered to said plaintiff, John Romig, a certain mortgage deed conveying the following-described real estate to wit:

The east half of the northeast quarter of section eighteen, township twenty-two, range six west of the Indian meridian, lying and situated in the county of Garfield and Territory of Oklahoma. To secure the payment of a certain sum of money mentioned in said mortgage and in said petition. That the conditions of said mortgage had been broken and said mortgage had become absolute. That said plaintiff

is the legal owner and holder of said indebtedness and said mortgage.

That the said defendants claim a lien upon or right, title, estate, interest, or equity of redemption, in or to said premises or some part thereof subject and inferior to the rights of said plaintiff, and praying judgement for the amount due said plaintiff on the said indebtedness for the foreclosure of said mortgage. That the lien, claim, interest, estate and equity of redemption of the said defendants in and
28 to said premises if any they may have, be determined and settled and that said plaintiff be adjudged to have the first lien and claim upon said premises.

That said premises be ordered sold according to law, and the proceeds applied to the payment *to the payment* of said indebtedness due said plaintiff and that said defendants be forever barred and foreclosed of and from all right, title, estate, interest, property, and equity of redemption in or to said premises or any part thereof.

The affiant further says that said action is brought for the sale of the real estate under the aforesaid mortgage.

Affiant further says that he is unable and that the plaintiff is unable by using due diligence to obtain service of summons on the said defendants within the Territory of Oklahoma.

Affiant further states that on the — day of March, 1896, he caused a summons to be issued in said cause for said defendants, directed to the sheriff of Garfield county, Oklahoma Territory. Sheriff made return, " Defendants not found in my county."

Affiant further states upon information and belief that the said defendants Don A. Gillett and Myrtle Gillett are non-residents of the Territory of Oklahoma, and that service of summons cannot be made on the said defendants, Don A. Gillett and Myrtle Gillett within the said Territory of Oklahoma, and that said plaintiff wishes to obtain service upon said defendants by publication ; and further, affiant sayeth not.

D. D. TEMPLE.

Subscribed and sworn to in my presence, before me, this the 2nd day of June, 1896.

J. C. McCLELLAND, *Clerk*,
By W. B. JOHNSON, *Deputy*.

Endorsed as follows, to wit: #424. John Romig, plaintiff, *vs.* Don A. Gillett, *et al.*, defendants. Affidavit for publication. Filed June 2, 1896. J. C. McClelland, clerk, by W. B. Johnson, deputy.

29 That on the 16th day of December 1896, notice of publication, with authentication thereof, was duly filed, in the district court, which notice and authentication is in words and figures as follows:

*Publication Notice.*

TERRITORY OF OKLAHOMA, } ss:
*Garfield County,* }

In the District Court in and for said Territory and County.

JOHN ROMIG, Plaintiff,
*vs.*
DON A. GILLETT and MYRTLE GILLETT, Defendants.

Don A. Gillett and Myrtle Gillett will take notice that the said John Romig, plaintiff, did on the eleventh day of March, A. D. 1896, file his petition in said district court within and for the county of Garfield, and Territory of Oklahoma, against the said defendants, and that the said Don A. Gillett and Myrtle Gillett must answer said petition filed as aforesaid on or before the 23d day *day* of July, A. D. 1896, or said petition will be taken as true, and judgement rendered in said action against said defendant Don A. Gillett for the sum of seven hundred dollars with interest thereon at the rate of 12 per cent. per annum from the 9th day of March, A. D. 1896, and for the further sum of seventy dollars as attorneys' fees as provided in said note and mortgage, and for the costs of suit, and a further judgment against the said defendants, Don A. Gillett and Myrtle Gillett, for the foreclosure of a certain mortgage described in plaintiff's petition and dated the 2d day of February, A. D. 1895, upon the following-described real estate, to wit: The east one-half of the northeast one-fourth of section eighteen, township twenty-two north, range six west I. M., lying and situated in the county of Garfield, and the Territory of Oklahoma, and adjudging that said plaintiff has the first lien on said premises to the amount for which judgment will be taken as aforesaid, and ordering said premises to be sold according to law and the proceeds applied to the payment of the amount due plaintiff, attorney fees and costs of suit and forever barring and foreclosing said defendants from all right, title, estate, interest, property and equity of redemption in or to said premises or any part thereof.

Given under my hand and the seal of said court this the 2d day of June, A. D. 1896.

Attest:

[SEAL.]

J. C. McCLELLAND, *Clerk*,
By W. B. JOHNSON, *Deputy*.

*Affidavit of Publication.*

TERRITORY OF OKLAHOMA, } ss:
*Garfield County,* }

J. A. Buckles, being duly sworn, says that he is the editor of the Enid Weekly Eagle, a newspaper of general circulation published in Garfield county, Oklahoma, and that the attached notice was pub-

lished three consecutive times in the regular edition of said Enid Weekly Eagle and not in a supplement thereof, and that the first publication was on June 4th, 1896, and the last June 18th, 1896.

J. A. BUCKLES.

Subscribed and sworn to in my presence this Dec. 16th day, 1896.

J. C. McCLELLAND, *Clerk*,
By C. J. WEST, *Deputy*.

Printer's fee, $8.75.

31 That on the 18th day of December 1896, the hon. district court rendered judgment in said cause, which judgment is in words and figures as follows:

December, 1896, term, December 12th, 1896, 1st judicial day.

And now on this 12th day of December, 1896, at 10 o'clock a. m. pursuant to the order of the supreme court of the Territory of Oklahoma, and to the order of the Hon. Jno. L. McAtee presiding judge of this court, comes into open court J. C. McClelland, clerk, by M. A. Alexander, his deputy, and W. E. Thralls, sheriff, by H. H. Hoag, his deputy, and the presiding judge comes not.

And thereupon the sheriff makes public proclamation of the opening of court, and thereafter adjourns court until 9 o'clock a. m. of Monday, December 14th, 1896.

December, 1896, term, December 23rd, 1896, 9th judicial day.

Among other things the following proceedings were had and done this December, 1896 term:

32 In the District Court of Garfield County, Oklahoma Territory.

JOHN ROMIG, Plaintiff,
*vs.*
DON A. GILLETT and MYRTLE GILLETT, Defendants.

Journal Entry, Case No. 424.

DECEMBER 18TH, 1896.

Now on this day comes the said plaintiff, John Romig, by his attorney D. D. Temple, the said defendants, Don A. Gillett and Myrtle Gillett, come not but make default, although duly and legally served by publication for three (3) consecutive weeks in the Weekly Eagle, a weekly newspaper printed and published in the city of Enid, Garfield county, Oklahoma Territory, and of general circulation in said Garfield county, Oklahoma Territory. And thereupon this cause came on for trial upon the petition herein, in open court, and with the consent of the court, — waived the jury and submits his cause to the court. The court after hearing the arguments of the counsel find that all the allegations and averments contained in the petition of said plaintiff, filed herein are true, and that there was due $42.00 as interest on the principal of seven hundred ($700.00) dollars, on the

2nd day of February, 1896, and that the same is still due, and unpaid at this date the sum of forty-two ($42.00) dollars, from the said defendant, Don A. Gillett, and that the conditions of said mortgage were broken, and by reason thereof the whole amount mentioned in said note and mortgage become due and payable, and that there is due from the said defendant Don A. Gillett, to the said plaintiff on the note and mortgage sued on in this action the sum of seven hundred ($700.00) dollars, on the note mentioned in said petition, and sixty-six ($66.00) dollars, as interest due on the note, and the note specified that said indebtedness shall bear interest at the rate of twelve (12) per cent. per annum, payable semi-annually in advance, and if said note was collected by suit an attorney fee of ten (10) per cent. might be taxed as costs.

33 The court finds that the defendant, Don A. Gillett, executed and delivered to the plaintiff, the mortgage deed set forth in said petition, on the following-described real estate to wit:

The east half of the northeast quarter of section eighteen (18) township twenty-two (22) range six (6) west of Indian meridian, save and except a strip of land eighty feet wide off of the west side of said tract of land from the north- to the southern boundary, and that said mortgage was duly recorded on the 2nd day of February, 1896, in the office of the recorder of deeds, of said Garfield county, Oklahoma Territory, in Book 2 at page 89.

That the deed from Don A. Gillett to Myrtle Gillett was made and executed subsequent to plaintiff's mortgage.

The court also finds that the said defendant Don A. Gillett, made and delivered to the plaintiff, the seven-hundred-dollar note set forth in said petition, which said mortgage was given to secure, and that the forty-two dollars of interest was due on the 2nd day of February, 1896, and unpaid, and before the commencement of this action, and is unpaid at this time and that the conditions of said mortgage *having* been broken, and that the whole of the debt secured by said mortgage was due, by reason of the default of the payment of the interest according to the terms of said mortgage, and the court further finds that the said plaintiff has a lien on the land, and the tenements in said petition described, by virtue of the mortgage, in said petition set out to secure the payment of said indebtedness.

It is therefore, considered, ordered, and adjudged by the court, that the plaintiff do have and recover *all* and from the said defendant Don A. Gillett the sum of ($42.00), being the amount of default of interest, and twenty-four dollars and fifty cents, accrued interest since commencement of the suit together with the principal mentioned in said petition of seven hundred dollars, by reason of said default in the payment of said interest, the amount found due with interest at the rate of twelve per cent. per annum, from the date of this judgment and costs, and attorneys' fees of seventy dollars, and that the premises described in said petition be sold to satisfy

34 said judgement of seven hundred and sixty-six dollars and fifty cents, and costs of suit and an attorney fee of seventy dollars.

And it is further ordered and adjudged by the court, that in the

case the said defendants, or any one of them, fails from and after the rendition of this judgment to pay the said plaintiff the said sum of seven hundred and sixty-six dollars and fifty cents, the amount so as aforesaid found due to said plaintiff, together with the interest thereon and the costs of this action, including the attorney fee of seventy dollars, an order of sale issued to the sheriff of said county and Territory, commanding him to advertise and sell according to law, the lands and tenements in said petition described to wit:

The east one-half of the northeast quarter of section 18, township 22 north, range 6 west Indian meridian, except a strip of land 80 feet wide off of the west side of said tract of land from the north to the southern boundary, lying and situated in the county of Garfield, Oklahoma Territory, and apply the proceeds arising from the sale.

First, to the payment of the costs of said sale and of this action and attorney fees.

Second, in the payment to the said plaintiff, said sum of seven hundred and sixty-six dollars and fifty cents, the amount so as aforesaid found due the said plaintiff with the interest thereon.

Third, the residue, if any, there be he pay to the defendant Don A. Gillett, and it is further ordered and adjudged by this court that from and after the sale of this land and tenements under and by *the* virtue of this judgment and decree, that the said defendant Don A. Gillett and Myrtle Gillett and all persons claiming under them, since the commencement of this action be, and are hereby forever barred, foreclosed of, and from all liens upon the right, title, interest, estate or equity or redemption of, in, or to, said lands and tenements or any part thereof, and the sheriff is hereby directed to place in possession the purchaser of said property.

(Signed) JNO. L. McATEE, *Judge*.

35 (Endorsed:) # 424. Journal entry of judgment. Filed, Jan. 20, 1897. J. C. McClelland, clerk. By M. A. Alexander, deputy. February 17, 1899, by order of sale, credit on judgment of $298.10.

36 That on the 20th day of January, 1897, the clerk of the district court, issued an order for the sale of the land mentioned in said judgment, which order of sale, together with the notice of said sale, the appraisement of said land, together with return of the sheriff, which order of sale, the notice, appraisement and return thereto is in words and figures as follows:

*Notice of Sale.*

Notice is hereby given, that by virtue of a judgment and decree in foreclosure, rendered and given by the district court of the 5th judicial district in and for the county of Garfield and Territory of Oklahoma, and entered and docketed in the office of the clerk of said court in and for said county, on the 18th day of December, 1896, in an action wherein John Romig, plaintiff, and Don A. Gillett and Myrtle Gillett, defendants, in favor of the said plaintiff

and against the said defendant, Don A. Gillett for the sum of seven hundred and sixty-six dollars and sixty-six cents, and attorney fees at seventy dollars. Which judgment and decree among other things directed the sale by me of the real estate hereinafter described, to satisfy the amount of said judgment, with interest thereon and the costs and expenses of such sale, or so much thereof as the proceeds of such sale applicable thereto will satisfy. And by virtue of a writ to me issued out of the office of the clerk of said court in and for said county of Garfield and under the seal of said court, directing me to sell said real property pursuant to said judgment and decree, I, James Z. Bishop, sheriff of said county, and person appointed by said court to make said sale will sell the hereinafter-described real estate to the highest bidder for cash, at public auction, at the front door of court-house in the city of Enid, in the county of Garfield and Territory of Oklahoma, on the 23d day of February, A. D. 1897, at 10 o'clock a. m. of that day, to satisfy said judgment, with interest and costs thereon, and the cost and expenses of such sale, or so much thereof as the proceeds of such sale applicable thereto will satisfy. The premises to be sold as aforesaid pursuant to
37 said judgment and decree, and to said writ, and to this notice, are described in said judgment, decree, and writ, as follows, to wit:

The east half of the northeast quarter section 18, township 22, range 6 west I. M., Garfield county, Oklahoma Territory, save and except a strip of land 80 feet wide off of the west side of said tract of land from north to southern boundary.

JAMES Z. BISHOP,
*Sheriff of Garfield County, Territory of Oklahoma.*

D. D. TEMPLE,
*Attorney for Plaintiff, of Enid, Territory of Oklahoma.*

*Affidavit of Publication.*

TERRITORY OF OKLAHOMA, } ss:
*Garfield County,* }

J. A. Buckles, being duly sworn, says that he is the editor of the Enid Weekly Eagle, a newspaper of general circulation published in Garfield county, Oklahoma, and that the attached notice was published 5 consecutive times in the regular edition of said Enid Weekly Eagle and not in a supplement thereof, and that the first publication was on January 22, 1897, and the last February 18, 1897.

J. A. BUCKLES.

Subscribed and sworn to in my presence this 23d day of February, 1897.

JAMES A. TAGGART,
*County Clerk,*
[SEAL.] By B. F. BUFFINGTON, *Deputy.*

Printer's fee, $12.50.

38 *Order of Sale.*

District Court, Fifth Judicial District, Garfield County, Oklahoma Territory.

TERRITORY OF OKLAHOMA, } ss:
*County of Garfield,* }

The Territory of Oklahoma to the sheriff of Garfield county, Greeting:

Whereas on the 18th day of December, 1896, John Romig recovered a judgment in the district court, sitting in and for said county, against Don A. Gillett and Myrtle Gillett for the sum of seven hundred ($700.00) dollars with interest at 12 per cent. per annum from the 2nd day of February, 1896, amounting to sixty-six dollars and fifty cents ($66.50) and seventy ($70.00) dollars attorney's fees, and costs taxed at fifteen dollars and forty cents ($15.40) and interest on judgment from date thereof, amounting to seven dollars and sixty cents ($7.60) and accruing costs on this order of sale. And whereas on the same day a decree was also rendered in said cause in said court, whereby it was ordered, adjudged and decreed by the court that a certain mortgage given to secure the payment of said sums be foreclosed, and all the right, title and interest of Don A. Gillett and Myrtle Gillett, to and in the land in said mortgage described to wit:

The east half of the northeast quarter section eighteen (18), township twenty-two (22), range six (6) west Indian meridian, save and except a strip of land eighty feet (80) wide off of the west side of said tract of land from north to the southern boundary, situated in Garfield county, Territory of Oklahoma, be sold by the sheriff of said county in the manner prescribed by law, and the proceeds of said sale, or so much thereof as is necessary, be applied in payment of said sums.

39 You are therefore commanded to levy upon said above-described land, sell the same in the manner prescribed by law and have the money in the clerk's office to satisfy said judgment, interest, attorney's fee and costs. Return this order of sale, within sixty days, with your doings in the premises endorsed thereon.

Witness my hand and the seal of said district court, this 20th day of January, 1897.

J. C. McCLELLAND,
*Clerk District Court,*
[SEAL.] By M. A. ALEXANDER, *Deputy.*

*Return.*

TERRITORY OF OKLAHOMA, } ss:
*County of Garfield,* }

I, James Z. Bishop, sheriff of said county, do hereby certify that I received the above and foregoing order of the sale on the 22d day

of January, 1897, and executed the same by levying on the land therein described on the 22d day of January, 1897, and on the same day caused said land to be appraised by three disinterested householders resident of said county as is shown by the inventory and appraisement hereto attached. On the 22d day of January, 1897, I caused a notice of the sale of said land to be published in the Enid Eagle, a weekly newspaper of general circulation in said county, and said notice was published in said newspaper six consecutive weeks covering a period of more than thirty days prior to the date set for the sale of said land to wit: the 23d day of February, 1897, as is shown by a copy of said notice and publisher's affidavit hereto attached and made a part of this return.

On the 23d day of February, 1897, pursuant to said notice and at the time and place mentioned in said notice, I offered said land for sale at public auction. Whereupon John Romig bid the sum of $415.00 for said land, and said bid of said John Romig being the highest and best bid made for said land and being more than two-thirds of the appraised value thereof, said land was thereupon by me sold to said John Romig for said sum of four hundred and fifteen dollars.

40 Witness my hand this 23 day of February, 1897.

JAMES Z. BISHOP, *Sheriff*,
By C. V. PORTER,
*Under Sheriff.*

Endorsed as follows: # 424. Order of sale. District court, Garfield county, O. T., December term, A. D. 1896. John Romig *vs.* Don A. Gillett *et al.*, issued January 20, 1897, returnable, March 22, 1897.

| | |
|---|---|
| Debt | $766.50 |
| Clerk | 7.25 |
| Sheriff | .10 |
| Attorney | 70.00 |
| Int. on judgment | 7.60 |
| Printer | 8.15 |
| Total | $859.60 |
| Accrued costs on this writ to clerk | 2.00 |
| | $861.60 |

Filed, February 27, A. D. 1897. J. C. McClelland, clerk, by M. A. Alexander, deputy. D. D. Temple, attorney for plaintiff. Sheriff's cost on this order of sale. Summons appraisers, $1.00; levy, $.50; advertising $.50; appraisement, $.50; sale, $.50; commission, $9.30; deed, $1.50; total $13.80 and confirming sale, $1.00; printer's fee, $12.50; appraisers, $1.50; Louis J. A. Vollers, George W. Graham, S. Burkett. James Z. Bishop, sheriff, by C. V. Porter, under sheriff

41 *Valuation and Appraisement of Real Estate under Order of Sale.*

TERRITORY OF OKLAHOMA, } ss:
*Garfield County,* }

In the Probate Court of the County of Garfield, Territory of Oklahoma.

JOHN ROMIG, Plaintiff,
*vs.*
DON A. GILLETT and MYRTLE GILLETT, Defendants.

We, Louis J. A. Vollers, Geo. W. Graham, and S. Burkett, disinterested householders, residing in Garfield county, Territory of Oklahoma, having been by J. Z. Bishop, sheriff of said county of Garfield, duly summoned to appraise the property taken under order of sale in this cause, after first being sworn, do return that upon actual view of said premises, and after having been on said premises, we find and estimate the same to be of the total value and appraisement of six hundred dollars; the said property being described and separately appraised as follows, to wit:

The east half of the northeast quarter section eighteen (18), township twenty-two (22), range six (6) west Indian meridian, save and except a strip of land eighty (80) feet wide off of the west side of said tract of land from north to the southern boundary.

LOUIS J. A. VOLLERS. [SEAL.]
GEO. W. GRAHAM. [SEAL.]
S. BURKETT. [SEAL.]

Dated Enid, O. T., Jan. 22, A. D. 1897.

TERRITORY OF OKLAHOMA, } ss:
*Garfield County,* }

I do hereby certify that the above-named Louis J. A. Vollers, Geo. W. Graham, and S. Burkett, are disinterested householders, residents of Garfield county in said Territory, and were by
42 me duly summoned and sworn impartially to appraise the within-described property upon actual view thereof, this the 22d day of January A. D. 1897.

JAMES Z. BISHOP, *Sheriff,*
By C. V. PORTER,
*Under Sheriff.*

Endorsed as follows: # 424. Valuation and appraisement of real estate under execution. John Romig, *vs.* Don A. Gillett and Myrtle Gillett. Filed January 22, 1897. J. C. McClelland, clerk. By M. A. Alexander, deputy.

I hereby certify the within to be the original appraisement.

JAMES Z. BISHOP, *Sheriff*,
By C. V. PORTER,
*Under Sheriff.*

43 That on the 2d day of March, 1897, the said John Romig, filed his motion for confirmation of said sale, which motion is in words and figures as follows;

In the District Court of Garfield County, Oklahoma Territory.

JOHN ROMIG, Plaintiff,
*vs.*
DON A. GILLETT ET AL., Defendants. } Motion to Confirm Sale.

Now on this day comes the plaintiff by his attorney, D. D. Temple, and moves the court to confirm the sale made in said cause on the 23d day of February, 1897, for the east half of the northeast quarter of section eighteen (18), township twenty-two (22), range six (6) W., by the sheriff of said county and Territory and a deed ordered made to John Romig, plaintiff, he being the highest best bidder.

D. D. TEMPLE,
*Att'y for Plaintiff.*

Endorsed as follows: No. 424.—John Romig, *vs.* Don A. Gillett, Motion to confirm sale. Filed March 2d, 1897. J. C. McClelland, clerk. By M. A. Alexander, deputy.

44 That thereupon on the first day of March, 1897, the court rendered judgment, confirming said sale. Which judgment of confirmation is in words and figures as follows;

February, 1897, term, February 15th, 1897, 1st judicial day.

Court convened Monday, February 15th, 1897, at 10 o'clock a. m., pursuant to the order of the supreme court of the Territory of Oklahoma.

There were present Hon. Jno. L. McAtee, presiding judge, J. C. McClelland, clerk, by C. J. West, his deputy, J. Z. Bishop, sheriff, O. D. Hubbell, county attorney, and Jno. L. McAtee Jr., court reporter, and Jno. R. Chamberlain, court bailiff and crier.

Public proclamation of the opening of court having been made by said crier, proceedings were had as follows, to wit;

February, 1897, term, February 25th, 1897, 9th judicial day.

Among other things the following proceedings were had on this 25th day of February, 1897, the same being the 9th judicial day of the February, 1897, term.

45 In the District Court in and for the Fifth Judicial District, Garfield County, Oklahoma Territory.

JOHN ROMIG, Plaintiff,
*vs.*
DON A. GILLETT and MYRTLE GILLETT, Defendants. } No. 424. Journal Entry.

And now comes the said plaintiff, by D. D. Temple, his attorney, and on motion of said plaintiff, and on producing to the court the return of the sheriff of this county, of a sale of real estate made by him on the 23d day of February, 1897, to the said plaintiff, John Romig, on an order of sale, issued in this case and dated the 21 day of January, 1897, and the court having carefully examined the proceedings of said sheriff in making said sale, being satisfied that said sale has been made in all respects in conformity to law and the statutes in such cases made and provided. It is ordered and adjudged by the court that said sale and the proceedings be, and the same are hereby in all respects confirmed, and the clerk of said court is hereby directed to make an entry on the journal that the court is satisfied with the legality of such sale, and the said sheriff is ordered to execute to said John Romig, the said purchaser at said sale, a good and sufficient deed for said lands and tenements, so sold to wit;

The east half of the northeast quarter, section 18, township 22, range 6 west of the Indian meridian, lying and situate in the county of Garfield and Territory of Oklahoma, save and except a strip of land 80 feet wide off of the west side of said tract of land from the north to the southern boundary.

It is further ordered that the said purchaser of said premises at said sale, be let into possession of said premises and every part thereof, and that said defendants and every person who has come into possession under them, or either of them, since the com-
46 mencement of this action, deliver possession thereof to said purchaser, on the production of the sheriff's deed for said premises, and on refusal of the said defendants, or either of them, or any one in possession under them, or either of them as aforesaid to deliver possession of said premises to said purchaser, that the sheriff of said county, put the said purchaser of said premises into possession of the same.

JNO. L. McATEE,
*Judge of the Fifth Judicial District, Okla. Territory.*

(Endorsed:) No. 424. John Romig, plaintiff, *vs.* Don A. Gillett, *et al.*, defendant. Journal entry on confirmation of sale. Filed Mar. 1, 1897. J. C. McClelland, clerk of dist. court, by C. J. West, dep.

47 That in pursuance of said order and judgment of the court, the sheriff of Garfield county, Oklahoma Territory, did on the 9th day of March, 1897, make a deed for said land to

the said John Romig which deed is in words and figures as follows:

*Sheriff's Deed. Order of Sale with Appraisement.*

Know all men by these presents: That whereas, on the 18 day of December A. D. 1896, in the district court, within and for the county of Garfield, and Territory of Oklahoma, at the November term A. D. 1896 of said court, then being held in and for said county, in a certain action then pending in said court, wherein John Romig, — plaintiff, and Don A. Gillett and Myrtle Gillett, defendants, the said John Romig by the consideration of the said court, recovered a judgment against the said Don A. Gillett for the sum of seven hundred and sixty-six and $\frac{50}{100}$ dollars, with interest on the amount of said judgment from the date thereof until paid, at the rate of 12 per cent. per annum; and also all costs in said action taxed at eighty-five and $\frac{40}{100}$ dollars; and a further judgment ordering that the mortgage given by Don A. Gillett to John Romig of date February 2, 1895, be and the same was foreclosed.

And it was further ordered by said court in said action, that an order of sale of said property be issued to the sheriff of said Garfield county, and that said described real estate be appraised, advertised and sold according to law, and that the proceeds arising from said sale be applied, first, — the payment of all the cost of this action.

Second. To the payment of the plaintiff's judgment of $766.50.

Third. The residue if any there be to the defendant Don A. Gillett; and afterwards to wit: on the 20 day of January, 1897, an order of sale of that date was issued out of said court by the clerk thereof upon and in pursuance of said judgment, directed to the sheriff of said county of Garfield, commanding him to cause
48 to be appraised, and to advertise and to sell the above-described real estate to satisfy the foreclosure judgment herein, and costs, and that he make due return of the manner in which he executed said writ within sixty days of the date thereof.

And whereas the said order of sale was duly delivered to and received by the said sheriff on the 22 day of January, 1897, at — o'clock — m., of that day, and the said sheriff, by virtue thereof, did on the 22 day of January, 1897, levy upon the lands and tenements above described, and did on the 22 day of January, 1897, call an inquest of three disinterested householders, residents within said county of Garfield, and administered to them an oath impartially to appraise the property so levied upon, upon actual view thereof; and the said householders, having impartially appraised said property upon actual view thereof forthwith made and returned to James Z. Bishop, said sheriff, under their hands, an estimate of the real value of said property; and on receipt of said estimate, the said sheriff deposited a copy thereof with the clerk of said court.

And whereas, the said sheriff then advertised said property for sale, by causing a notice that he would on the 23 day of February A. D. 1897, at 10 o'clock a. m., of that day, at the court-house door

in the city of Enid, in said county of Garfield, offer at public sale and sell the said lands and tenements to the highest bidder for cash in hand at the time of sale, to be published for more than thirty days previous to the time of said sale, in the Enid Weekly Eagle, a newspaper printed and published in the said county of Garfield, and of general circulation therein.

And whereas, on the said 23 day of February, 1897, at 10 o'clock a. m., of that day, at the court-house door aforesaid, the said sheriff did offer for sale and sell the lands and tenements above described to John Romig at and for the price and sum as follows, to wit: The east half of the northeast quarter of section eighteen, township twenty-two, range six west I. M., except a strip of land eighty
49 feet wide off of the west side from the north to the south boundary, at and for the sum of $415.00 cash in hand paid by John Romig. *He* being the highest and best bid made therefor, and being more than two-thirds of the appraised value of the said land and tenements.

And whereas, the said sheriff duly returned the said order of sale into said court, with his proceedings thereunder duly certified and endorsed thereon; and the said court, on the 23 day of February, 1897, after having carefully examined the said proceedings of the said sheriff, and being satisfied that the said sale had in all respects been made in conformity with the provisions of law, directed the clerk of said court to make an entry on the journal thereof, that the said court is satisfied of the legality of said sale, and an order that the said sheriff make to the said purchaser a deed for said property so purchased as aforesaid, and such entry and order were thereupon then and there duly made and entered accordingly.

And whereas the said John Romig has paid the said purchase-money in full:

Now therefore, I, James Z. Bishop, sheriff of the said county of Garfield, in consideration of the premises, and by virtue of the powers in me vested by law, do hereby give, grant, sell and convey unto the said John Romig, heirs and assigns, the land so sold as aforesaid, situate in the county of Garfield, and Territory of Oklahoma, and described as follows, to wit: the east half of the northeast quarter of section eighteen, township twenty-two, range six west I. M., except a strip eighty feet wide off of the west side from the north to the south boundary, to have and to hold the same unto the said John Romig, his heirs and assigns forever.

In testimony whereof, I, the said James Z. Bishop, sheriff, as aforesaid, have hereunto set my hand, this 9th day of March A. D. 1897.

JAMES Z. BISHOP,
*Sheriff of Garfield County, Oklahoma Territory.*

50 TERRITORY OF OKLAHOMA, } ss:
*Garfield County,* }

Be it remembered, that on this 9th day of March A. D. 1897 before me, the undersigned, a clerk of the district court in and for the county and Territory aforesaid, came James Z. Bishop, sheriff of the

county of Garfield, in the Territory of Oklahoma, who is personally known to me to be the same person who executed the foregoing instrument of writing, and duly acknowledged the execution of the same, as sheriff aforesaid.

In witness whereof, I have hereunto set my hand and affixed my official seal, the day and year last above written.

J. C. McCLELLAND,
[SEAL.] *Clerk District Court,*
By M. A. ALEXANDER, *Deputy.*

(Endorsed:) Sheriff's deed. By J. Z. Bishop, sheriff of Garfield county, Oklahoma Territory, to John Romig.

The within instrument was filed for record in the office of register of deeds in and for the county of Garfield, and Territory of Oklahoma, on the 10 day of March, 1897, at 10.20 o'clock a. m., and duly recorded in Book I on page 165.

J. L. REGER,
[SEAL.] *Register of Deeds for said County.*

51 Thereafter on the 11 day of May, 1898, Myrtle Gillett filed a motion to set aside the judgment heretofore rendered in favor of John Romig, against said Myrtle Gillett and Don A. Gillett. From the judgment of the court upon the hearing of said motion, and the ruling of the court upon the same, this appeal is taken, which motion, notice, and affidavits in *the* support of the same *is* in words and figures as follows:

In the District Court of Garfield County, O. T.

JOHN ROMIG, Plaintiff,
*vs.*
DON A. GILLETT and MYRTLE GILLETT, Defendants.

*Motion to Set Aside Judgment.*

Comes now the defendant Myrtle Gillett and appearing for the purposes of this motion duly moves the court to set aside the judgment in said cause rendered against her on the 18th day of December, 1896, in above court and all the proceedings had thereunder for the reasons following, to wit:

1st. That the court had no jurisdiction of the defendant, Myrtle Gillett.

2nd Because said court had no jurisdiction to render said judgment.

3rd. Because the defendant was at all times during the pendency of said action a resident of the Territory of Oklahoma and was personally present therein during all aforesaid time and lived openly and notoriously within twenty miles of the real estate upon which the mortgage in said action was attempted to be foreclosed and which was attempted to be sold under the order of sale issued in

said cause, upon a farm in said Territory where she had resided since the spring of 1889 and where she was well and familiarly known by everybody in the neighborhood and had been for years prior to the commencement of said action and no summons was ever served upon her in said action.

52 4th. That the attempted service by publication had in said cause upon the said Myrtle Gillett was irregular and void for the reason that the said Myrtle Gillett was a resident of said Territory and had not absconded from her usual place of abode in said Territory nor had she so concealed herself that process could not be served upon her, nor had she departed from this Territory nor from the county of her residence with the intent to delay or defraud her creditors or to avoid service of summons or keep herself concealed therein for the purpose of avoiding service of summons; and for the further reason that the affidavit filed in said cause for the purpose of obtaining such service is not such as the law requires to be filed therefor.

ANDERSON & RUSH,
*Attorneys for Myrtle Gillett.*

To —— ——:

You are hereby notified that the above motion has been filed in the district court of Garfield county, this 11th day of May, 1898.

—— ——.

53 In the District Court of Garfield County, Oklahoma Territory.

JOHN ROMIG, Plaintiff,
*vs.*
DON A. GILLETT and MYRTLE GILLETT, Defendants.

To the above-named John Romig and Daniel W. Harding and their attorneys of record, L. N. Huston and D. D. Temple:

You are hereby notified that affidavits will be used in support of the motion filed by the defendant, Myrtle Gillett to set aside and vacate the judgment rendered in the above-entitled cause and will be presented to said court with said motion on the 19th day of September, 1898, at 9 o'clock a. m. or as soon thereafter as the same can be heard.

ANDERSON & RUSH,
*Attorneys for Myrtle Gillett.*

Service of above notice upon me acknowledged this 17th day of September, 1898.

D. D. TEMPLE,
*Att'y for John Romig.*
L. N. HOUSTON,
*Att'y for D. W. Harding.*

(Endorsed:) Romig *vs.* Gillett. Notice that affidavits will be used in support of motion to set aside judgment. Filed September 17th 1898. J. C. McClelland, clerk, by W. M. Bickel, deputy.

54 In the District Court of Garfield County, Oklahoma Territory.

JOHN ROMIG, Plaintiff,
*vs.*
DON A. GILLETT and MYRTLE GILLETT, Defendants.

Comes now the defendant, Myrtle Gillett and being sworn, says that on the 11th day of March, 1896, and for a long time prior thereto she was, ever since has been, and now is a resident of the county of Kingfisher and Territory of Oklahoma, and resided upon the real estate in said county described as follows, to wit: Southwest quarter of section 13, township 19, range 7, joining Hennessey, O. T.

That from said 11th day of March, 1896, until after the 18th day of June, 1896, said Myrtle Gillett was personally present upon said real estate, except when she was temporarily absent when visiting or transacting business in the neighborhood, and ever since said last date except-, have never been absent from home but for one week in July 1895 since we returned from living in Enid in 1893 & '4 to our present home.

That the said Myrtle Gillett, had resided upon said real estate for more than five years prior to said 11th day of March, 1896, and her home and residence was well known to the people of said neighborhood and county and to a large number of persons in Garfield county, O. T.

That this affiant had no knowledge of the institution or prosecution of the above-entitled cause until long after date of sale of land and had no actual notice of the inst-ution and pendency of said action.

[SEAL.] MYRTLE GILLETT.

Subscribed and sworn to before me, this 17 day of September, 1898.

GEO. W. BIER,
*Notary Public.*

Commission expires December 28, 1898.

(Endorsed:) Filed September 20, 1898. J. C. McClelland, clerk, by M. A. Alexander, deputy.

55 In the District Court of Garfield County, Oklahoma.

JOHN ROMIG, Plaintiff,
*vs.*
DON GILLETT and MYRTLE GILLETT, Defendants.

*Affidavit.*

TERRITORY OF OKLAHOMA, } ss:
*County of Kingfisher,* }

Guy R. Gillett, being sworn on his oath says that he is well acquainted with Don Gillett, the defendant in the above-entitled cause

and that to his personal knowledge the said Don Gillett was a non-resident of the county of Garfield and Territory of Oklahoma, from the 1st day of March, 1896, until after the 1st day of March, 1897.

[SEAL.] GUY R. GILLETT.

Subscribed and sworn to before me this 10 day of October, 1898.

S. P. RICHARDSON,
*Notary Public.*

My commission expires July 1st, 1899.

(Endorsed:) 424. Filed March 2, 1899, J. P. Renshaw, clerk, by M. A. Alexander, deputy.

56 (Endorsed:) No. 424. John Romig *vs.* Don A. Gillett and Myrtle Gillett. Motion to set aside judgment. Filed this 11th day of May, 1898. J. C. Corberand, clerk district court. By J. C. Corberand, deputy.

57 That on the 14th day of October, 1898, John Romig filed his affidavit as answer to Myrtle Gillett's motion to vacate said judgment. Which affidavit is in words and figures as follows:

In the District Court of Garfield County, Oklahoma Territory.

| | |
|---|---|
| JOHN ROMIG, Plaintiff, *vs.* DON A. GILLETT and MYRTLE GILLETT, Defendants. | Affidavit of Plaintiff, John Romig. |

TERRITORY OF OKLAHOMA, *Garfield County,* } *ss:*

John Romig of lawful age being first duly sworn on his oath says: That he is the plaintiff in the above-entitled action. That prior to the time the petition in said entitled action was filed I employed D. D. Temple as my attorney to foreclose the mortgage recited in said plaintiff's petition and as my attorney he was authorized to do all that was necessary to be done in said cause.

Affiant further says, that he is not nor never has been acquainted with the defendant named Myrtle Gillett, nor any person by the name of Myrtle Gillett, nor does he know that there is such a person; that no person of that name ever offered to pay the mortgage mentioned in plaintiff's petition nor any of the interest on said note, nor had they paid any taxes on said land mentioned in said mortgage.

That the only information concerning such a person this affiant had learned of during the proceedings in foreclosure is that a party of that name reside in the State of Kansas and not within the Territory of Oklahoma.

JOHN ROMIG.

Subscribed and sworn to before me this 14 day of October, 1898.

[SEAL.] J. J. McLEAN,
*Notary Public.*

My commission expires July 18, 1901.

58 (Endorsed:) No. 424. John Romig, plaintiff, *vs.* Don A. Gillett, *et al.*, defendants. Affidavit of John Romig, filed October 14th, 1898. J. C. McClellan, clerk, by M. A. Alexander, deputy.

Thereafter as further answer to the motion to set aside said judgment, John Romig by his attorney, on the 13th day of March, 1899, filed his motion to strike from the files the said motion of Myrtle Gillett, which motion is in words and figures as follows:

59 In the District Court of Garfield County, Oklahoma Territory.

JOHN ROMIG, Plaintiff,
*vs.*
DON A. GILLETT and MYRTLE GILLETT, Defendants.

*Motion to Strike from the Files the Motion of Myrtle Gillett to Set Aside the Judgment in the Above Cause.*

Comes now on this day, John Romig, plaintiff, and moves the court to strike from the files and dismiss the motion of Myrtle Gillett, hereinbefore filed in this cause, for the following reasons, to wit:

First. The motion filed in this cause is not sufficient to give the court jurisdiction in said cause.

Second. The motion does not state facts sufficient to warrant the relief asked.

Third. The defendant, Myrtle Gillett, has not tendered into court her answer to the original petition showing a meritorious defense to the same, nor has she offered to pay the costs of said suit as by law required.

Fourth. That there is no allegation in said motion that the said Myrtle Gillett has any defense to the action whatever as by law required.

Fifth. That said Myrtle Gillett does not state in her motion that she did not know of said suit, judgment and sale; nor that with diligence she was unable to learn of the same as by law required.

Sixth. That the proceeding herein sought to be had is barred by the statute of limitations.

Seventh. That the said Daniel W. Harding is the owner in fee-simple of the land specified in this action, to wit: The east half of the northeast quarter of section 18, township 22, north of range 6 west of the Indian meridian, except 80 feet off of the west side of said tract

60 from north to south, and purchased the same from John Romig, this plaintiff in this action, for a valuable consideration and is therefore an innocent purchaser and cannot be disturbed in his title and possession.

Eighth. The land mentioned and specified in said judgment having passed into the hands and possession of an innocent third party cannot be reached or affected by a motion, or any other way.

Ninth. The land having been sold by a decree of the court which decree of the court is in all things regular on its face, and the sale

of the same being in all things regular and fully complying with the law, and which sale was by regular order and decree of this court in all things duly confirmed and by the purchaser at said sale, sold and transferred to the said Daniel W. Harding, for a valuable consideration, cannot be set aside upon, and in the manner sought to be in their proceedings, or in any manner.

Tenth. The service and notice under which said judgment was rendered and said land sold, is and was amply sufficient and fully complies with all the requirements of the law.

Wherefore, the said John Romig, plaintiff herein, prays that said motion be dismissed, and that he recover his costs in this behalf laid out and expended.

D. D. TEMPLE,
*Attorney for Harding.*

(Endorsed:) No. 424. Jno. Romig, plaintiff, *vs.* Don A. Gillett, *et al.* Motion of plaintiff to strike out. Filed March 13, 1899. J. P. Renshaw, clerk.

61 Thereafter and on the — day of —— 1899, the court overruled said motion to strike Myrtle Gillett's motion to set aside said judgment, to the overruling of which motion the said John Romig at the time excepted.

That on the 27th day of August, 1898, Daniel W. Harding for an answer to the motion to vacate said judgment filed the following motion and affidavits thereto attached. Which motion and affidavits are in words and figures as follows:

In the District Court in and for Garfield County, Territory of Oklahoma.

JOHN ROMIG, Plaintiff,
*vs.*
DON A. GILLETT and MYRTLE GILLETT, Defendants. } Motion.

Now comes Daniel W. Harding, defendant in the notice to set aside the judgment in the above-entitled cause, and for himself denies the grounds alleged in the motion filed to set aside the judgment in said cause, and in support of this motion files his affidavit herein set forth.

DANIEL W. HARDING, *Defendant.*

(Endorsed:) No. 424. John Romig, plaintiff, *vs.* Don A. Gillett, *et al.*, defendants. Motion of Daniel W. Harding, defendant. Filed August 27, 1898. J. C. McClelland, clerk. By M. A. Alexander, deputy. L. N. Houston, attorney for Harding.

62 In the District Court in and for Garfield County, Territory of Oklahoma.

JOHN ROMIG, Plaintiff,
*vs.*
DON A. GILLETT and MYRTLE GILLETT, Defendants. } Affidavit of Daniel W. Harding Denying Grounds to Set Aside Judgment.

TERRITORY OF OKLAHOMA, *Garfield County,* } *ss:*

Daniel W. Harding of lawful age being first duly sworn, on his oath says: That on the 9th day of March, 1897, for a valuable consideration I purchased in good faith of John Romig, plaintiff in the above-entitled cause the east half of the northeast quarter of section eighteen (18) township twenty-two (22) range six (6) west I. M. except a strip of 80 feet off of the west side from the north to the southern boundary.

And that ever since the date of the purchase of said described tract of land from said John Romig and at the time said notice to set aside said judgment was served on this affiant, as well as up to the present time, this affiant has been in full and complete possession of said land and the owner and holder of the same, and without any knowledge of any rights or claim of any person other than the said John Romig, his grantor, who held the same under a sheriff's sale and deed prior to purchase of same by this affiant. And further affiant says that the deed conveying said tract of land to this affiant by said John Romig is a general warranty deed and is recorded on page 170 in Book "5" of Deeds in the office of the register of deeds of Garfield county, Territory of Oklahoma.

DANIEL W. HARDING.

Subscribed and sworn to this 27th day of August, 1898.

J. C. McCLELLAND,
[SEAL.] By M. A. ALEXANDER, *Deputy.*

63 (Endorsed:) No. 424. John Romig, plaintiff, *vs.* Don A. Gillett, *et al.*, defendants. Affidavit of Daniel W. Harding. Filed August 27th, 1898. J. C. McClelland, clerk. By M. A. Alexander, deputy. L. N. Houston, attorney for Harding.

On the 18th day of March, 1899, Daniel W. Harding filed his motion, filed in this cause on the 27th day of August, 1898, also asking leave to file a motion to strike from the files the motion of Myrtle Gillett, which motion is in words and figures as follows:

In the District Court of Garfield County, Oklahoma Territory.

JOHN ROMIG, Plaintiff,
*vs.*
DON A. GILLETT and MYRTLE GILLETT, Defendants. } No. 424.

Now on this day comes Daniel W. Harding and asks leave of the court to withdraw his motion and affidavit hereinbefore filed herein,

and file a motion to strike from the files the application of Myrtle Gillett to set aside the judgment in this cause.

L. N. HOUSTON,
*Att'y for Daniel W. Harding.*

(Endorsed:) No. 424. John Romig, plaintiff, vs. Don A. Gillett, *et al.* Application of Daniel W. Harding to withdraw affidavit and motion and to file motion to strike application of Myrtle Gillett from the files. Filed March 18, 1899. J. P. Renshaw, clerk, by M. A. Alexander, deputy.

64 That thereafter on the — day of ——, 1899, the court refused to allow said motion to be withdrawn, to which ruling of the court, in refusing the withdrawal of said motion, the said Harding at the time excepted.

That thereafter on the 12th day of April, 1899, by leave of the court, the defendant, Daniel W. Harding, filed his separate motion together with exhibits to strike the motion of Myrtle Gillett from the files, which motion is in words and figures as follows:

In the District Court of Garfield County, Oklahoma Territory.

JOHN ROMIG, Plaintiff,
*vs.*
DON A. GILLETT and MYRTLE GILLETT, Defendants.

*Motion to Strike from the Files the Motion of Myrtle Gillett to Set Aside the Judgment in the Above Cause.*

Comes now on this day, Daniel W. Harding, and enters his special appearance for this motion only, and moves the court to strike from the files and dismiss the motion of Myrtle Gillett, hereinbefore filed in this cause, for the following reasons, to wit:

First. The motion filed in this cause is not sufficient to give the court jurisdiction in said cause.

Second. The motion does not state facts sufficient to warrant the relief asked.

Third. The defendant, Myrtle Gillett, has not tendered into court her answer to the original petition, showing a meritorious defense to the same, nor has she offered to pay the costs of said suit as by law required.

Fourth. That there is no allegation in said motion that the said Myrtle Gillett has any defense to the action whatever as by law required.

65 Fifth. That said Myrtle Gillett does not state in her motion that she did not know of said suit, judgment and sale; nor that with diligence she was unable to learn of the same as by law required.

Sixth. That the proceeding herein sought to be had is barred by the statute of limitations.

Seventh. That the said Daniel W. Harding is the owner in fee-

simple of the land specified in this action, to wit: the east half of the northeast quarter of section 18, township 22, north of range 6 west of the Indian meridian, except 80 feet off of the west side of said tract from north to south, and purchased the same from John Romig, the plaintiff in this action, for a valuable consideration without notice of any defects, and is therefore an innocent purchaser and cannot be disturbed in his title and possession.

Eighth. The land mentioned and specified in said judgment having passed into the hands and possession of an innocent third party, cannot be reached or affected by a motion.

Ninth. The land having been sold by a decree of the court which decree of the court is in all things regular on its face and the sale of the same being in all things regular and fully complying with the law, and which sale was by regular order and decree of this court in all things duly confirmed and by the purchaser at said sale, sold and transferred to the said Daniel W. Harding, for a valuable consideration, cannot be set aside upon, and in the manner sought to be in their proceedings.

Tenth. The service and notice under which said judgment was rendered and said land sold, is and was amply sufficient and fully complies with all the requirements of the law.

Wherefore, the said Daniel W. Harding prays that said motion be dismissed and that he recover his costs in this behalf laid out and expended.

L. N. HOUSTON,
*Attorney for Harding.*

66 (Endorsed:) No. 424. John Romig, plaintiff, *vs.* Don A. Gillett, *et al.* Motion of Daniel W. Harding to strike from the files. Filed March 20, 1899. J. P. Renshaw, clerk. By W. M. Bickel, deputy.

67 *Warranty Deed.*

Know all men by these presents: That John Romig and Angie A. Romig, his wife, of the county of Garfield and Territory of Oklahoma, for and in consideration of the sum of nine hundred and fifty dollars in hand paid, do hereby grant, bargain, sell, convey and confirm unto Daniel W. Harding of the county of Garfield and Territory of Oklahoma, the following-described real estate, situate in —— in Garfield county and Territory of Oklahoma, to wit:

The east half of the northeast quarter of section eighteen (18) township twenty-two (22), range six (6) west of I. M., except a strip of 80 feet off of the west side from the north to the southern boundary.

And we do hereby covenant with the said Daniel W. Harding and his heirs and assigns that we are lawfully seized of said premises; that they are free from incumbrance that we have good right and lawful authority to sell the same, and we do hereby covenant to warrant and defend the title to said premises against the lawful claims of all persons whomsoever. And I, the said Angie A. Romig

hereby relinquish all right of every kind that I may have or be entitled to, in and to the above-described premises, as the wife of said John Romig.

JOHN ROMIG.
ANGIE A. ROMIG.

Signed this 9th day of March, 1897, in presence of—
GEORGE THOMPSON.
L. B. SAWYER.

TERRITORY OF OKLAHOMA, } ss:
*Garfield County,* }

Before L. B. Sawyer, a notary public, in and for the above-named county and Territory, on this 9th day of March, 1897, personally appeared John Romig and Angie A. Romig, his wife, and are to me known to be husband and wife and executed the above conveyance of lands to me known not to be the homestead of grantors, and each for themselves acknowledge the execution thereof to be their free and voluntary act for the purpose named.

Witness my hand and official seal, the date above written.

L. B. SAWYER,
*Notary Public.*

68 [SEAL.] My commission expires Dec. 11, 1897.

(Endorsed:) Warranty deed. From John Romig and Angie A. Romig to Daniel W. Harding. Territory of Oklahoma, Garfield county, ss. Entered in numerical index and filed for record in the register's office of said county on the 10th day of March, 1897, at 1.40 p. m. and recorded in Book 5 of Deeds on page 170. Fee $1.00. (Seal.) J. L. Reger, register of deeds. Filed April 12, 1899. J. P. Renshaw, clerk, by Frank Worcester, deputy.

69 Thereafter on the — day of —— 1899, the court after duly considering said motion overruled the same, to which ruling of the court, in overruling said motion, the defendant Harding at the time excepted.

That on the 13th day of April, 1899, Myrtle Gillett, filed her motion for an order to put her into possession of the lands in controversy in this cause, which motion is in words and figures as follows:

70 In the District Court of Garfield County, O. T.

JOHN ROMIG, Plaintiff, } ss:
*vs.*
DON A. GILLETT and MYRTLE GILLETT, Defendants. }

And now comes the defendant, Myrtle Gillett, and moves the court to restore to her the possession of the land taken from her under this the proceedings in this cause and for an order directed

to the sheriff of said county commanding him to remove the purchaser, John Romig and his grantee, Daniel W. Harding, and all other persons claiming by, through, or under him from the possession of said premises and every part thereof and to put the plaintiff in possession thereof.

ANDERSON & RUSH,
*Attorneys for Myrtle Gillett.*

(Endorsed:) John Romig *vs.* Don A. Gillett *et al.* Motion. Filed April 13, 1899. J. P. Renshaw, clerk. By W. M. Bickel, deputy.

71 That on the — day of —— 1899, the court, after duly considering said motion, sustained the same, and grants an order commanding the sheriff of Garfield county to put said Myrtle Gillett into possession of said land, to which ruling, and to the making of said order to put the said Myrtle Gillett into the possession of said land the defendants, John Romig and Daniel W. Harding at the time excepted.

Which order and judgment is in words and figures as follows:

Court convened Thursday, September 15, 1898, at 10 o'clock a. m., pursuant to the order of the supreme court of Oklahoma.

There were present the Hon. Jno. L. McAtee, presiding judge, Jno. L. McAtee, Jr., court stenographer, James Z. Bishop, sheriff, O. D. Hubbell, county attorney, and J. C. McClelland, clerk, by W. M. Bickell, deputy, and D. W. Jones, deputy U. S. marshal.

Public proclamation of the opening of court having been announced by the sheriff, proceedings were had as follows:

JOHN ROMIG
*vs.* } # 424.
DON A. GILLETT.

And now by agreement this cause is set for argument Monday morning, September 19th, 1898.

72 March, 1899, term, March 1st, 1899, 1st judicial day.

Court convened Wednesday, March 1st, 1899, at 10 o'clock a. m., pursuant to the order of the supreme court of Oklahoma.

Present: The Hon. Jno. L. McAtee, associate justice, sole judge presiding, C. V. Porter, sheriff, C. H. Thompson, marshal, Jno. L. McAtee, Jr., stenographer, J. P. Renshaw, clerk, by W. M. Bickell, deputy, and Elzie Thralls, crier.

Public proclamation of the opening of court having been announced proceedings were had as follows, to wit:

March, 1899, term, March 13th, 1899, 8th judicial day.

Among other things the following proceedings were had on this 13th day of March, 1899, the same being the 8th judicial day of the March, 1899, term.

JOHN ROMIG
*vs.* } #424.
DON A. GILLETT.

And now the intervenor herein Harding is given until March 16th, to file motion to withdraw motion and order from file, and is also granted the privilege of filing brief in this cause by the 20th of said month if he desire.

73 March, 1899, term, April 1st, 1899, 25th judicial day.

Among other things the following proceedings were had on this 1st day of April, 1899, the same being the 25th judicial day of the March, 1899, term.

JOHN ROMIG
*vs.* } #424.
DON A. GILLETT.

And now leave is granted to interpleader Harding to attach deeds to his petition herein.

74 March, 1899, term, April 15th, 1899, 35th judicial day.

Among other things the following proceedings were had on this 15th day of April, 1899, the same being the 35th judicial day of the March, 1899, term.

JOHN ROMIG
*vs.* } #424.
DON A. GILLETT.

And now on this 15th day of April, this cause coming on to be heard and the motion heretofore filed in this cause by the defendant, Myrtle Gillett, to vacate and set aside the judgment heretofore rendered in this cause and all the proceedings had thereunder as to her the said Myrtle Gillett the court doth find that as to the said defendant, Myrtle Gillett, the judgment is void for want of jurisdiction and that all the proceedings under said judgment were wrongful; that the order of sale should not have been issued; that the levy, advertisement and sale under said order of sale was wrongful and void; that the order putting the purchaser, John Romig the plaintiff herein, into possession of said land and dispossessing defendant, Myrtle Gillett, was wrongful and an abuse of the process of this court; that the possession of said John Romig and of his grantee, Daniel W. Harding, was wrongfully obtained and wrongfully maintained; that the defendant, Myrtle Gillett, should in all respects be restored to her condition prior to entry of said void judgment and prior to her dispossession of said land by said void judgment under the void and unlawful order issued under said void judgment.

It is therefore ordered, adjudged and decreed that said judgment is void, that the order of sale, advertisement sale, report of sale and the sheriff's deed issued thereunder are each and all wrongful and

void, and that said judgment, order of sale, advertisement, appraisement, sale, report of sale and sheriff's deed are each and all set aside and held for naught.

Judgment reserved upon the question of right of possession of — and restitution.

To all of which plaintiff duly enters exceptions and by the court overruled.

75 That on the 15th day of April, 1899, the defendant, John Romig, filed his motion, which motion for a new hearing is in words and figures as follows:

TERRITORY OF OKLAHOMA, } ss:
*Garfield County,* }

In the District Court in and for said County and Territory and the Fifth Judicial District.

JOHN ROMIG, Plaintiff,
*vs.*
DON A. GILLETT and MYRTLE GILLETT, Defendants. } Motion for a New Trial.

Now, on this day comes said John Romig, plaintiff in the above-entitled cause, and moves the court to vacate and set aside the order, decree, findings, and judgment made by the court in this action on the 15th day of April, 1899, and to grant said plaintiff, John Romig, a new hearing and trial of this action on the motion filed by Myrtle Gillett in said cause on the 11th day of May, 1898, for to set aside the proceedings theretofore had in said cause, for the following causes, which affect materially the plaintiff's substantial rights, to wit:

First. The said order, decree, findings and judgment *is* not sustained by sufficient evidence.

Second. Said order, decree, findings and judgment *is* contrary to law.

Third. The court erred in finding that the order of sale theretofore issued, and the advertisement and sale under said order of sale, *was* wrongful and void.

76 Fourth. The court erred in finding that the order putting John Romig, the plaintiff, into possession of said land and dispossessing the defendant, Myrtle Gillett, was wrongful, and an abuse of the processes of this court.

Fifth. The court erred in finding that the possession of said Romig and Daniel Harding is wrongfully maintained.

Sixth. The court erred in finding that Myrtle Gillett should be reinstated to her prior condition.

Seventh. The court erred in finding that the judgment rendered foreclosing said mortgage was void.

Eighth. The court erred in setting aside the judgment, order of sale, appraisement, report of sale, and sheriff's deed.

Ninth. Errors of law occurring at the trial, and excepted to by the plaintiff at the time.

Tenth. The court erred in finding that the motion of Myrtle Gillett was sufficient to give the court jurisdiction.

Eleventh. The court erred in finding that the motion stated facts to warrant the relief asked.

Twelfth. The court erred in not requiring Myrtle Gillett to tender into court her answer to the original petition, showing a meritorious defense to the same.

Thirteenth. The court erred in not requiring Myrtle Gillett to tender into court the amount due on the mortgage, taxes, and for all improvements made since default in payment of mortgage.

Fourteenth. Newly discovered evidence material for said plaintiff, and which plaintiff could not with reasonable diligence have discovered and produced at the hearing of the trial.

D. D. TEMPLE,
*Attorney for Plaintiff.*

77 (Endorsed:) No. 424. In the district court. John Romig, plaintiff, *vs.* Don A. Gillett and Myrtle Gillett, defendants. Motion for a new trial. Filed April 15, 1899. J. P. Renshaw, clerk, by Frank Worcester, deputy.

The court after due consideration overrules said motion for a new hearing, to which ruling in overruling said motion, the defendant Romig excepted.

That on the 17th day of April, 1899, Daniel W. Harding, filed his motion for a new hearing, which motion is in words and figures as follows:

78 TERRITORY OF OKLAHOMA, } *ss:*
*County of Garfield,* }

In the District Court in and for said County and Territory and the Fifth Judicial District.

JOHN ROMIG, Plaintiff,
*vs.*
DON A. GILLETTE and MYRTLE A. GILLETTE, Defendants. } Motion for New Trial.

Now on this day comes Daniel W. Harding, and moves the court to vacate and set aside, the order, decree, findings and judgment made by the court in this action on the 15th day of April, 1899, and grant a new hearing and trial of this action on the motions filed by Myrtle A. Gillette in said cause on the 11th day of May, 1898 and set aside the proceedings theretofore had in said cause, for the following causes which materially affect the substantial rights of said Daniel W. Harding, to wit:

1st. That said order, decree, findings and judgment are not sustained by sufficient evidence.

2nd. Said order, decree, findings and judgment are contrary to law.

3rd. The court erred in finding that the order of sale heretofore issued, and the advertisement and sale under said order of sale were wrongful and void.

4th. The court erred in finding that the order putting John Romig, plaintiff, in possession of said land and dispossessing Myrtle A. Gillette was wrongful and abuse of the processes of this court.

5th. The court erred in finding that the possession of said Daniel W. Harding was wrongfully maintained.

79 6th. The court erred in finding that Myrtle A. Gillette should be reinstated to the possession of said land.

7th. The court erred in finding that the judgment rendered foreclosing said mortgage was void.

8th. The court erred in setting aside the judgment, order of sale, appraisement, record of sale, and sheriff's deed.

9th. The court erred in finding that the motion of Myrtle A. Gillette was sufficient to give the court jurisdiction.

10th. The court erred in not striking Myrtle A. Gillette's motion from the files.

11th. The court erred in finding that the motion stated facts sufficient to warrant the relief asked.

12th. Newly discovered evidence material for said Daniel W. Harding which could not with reasonable diligence have been discovered and produced at the hearing of the trial.

L. N. HOUSTON,
*Att'y for Daniel W. Harding.*

(Endorsed:) No. 424. In the district court. John Romig, plaintiff, *vs.* Don A. Gillette and Myrtle Gillette, defendants. Motion for new trial. Filed April 17, 1899. J. P. Renshaw, clerk, by Frank Worcester, deputy. L. N. Houston, att'y for D. W. Harding.

80 That after due consideration of said motion, the court overruled the same, and Daniel W. Harding at the time excepted, and the court thereupon rendered the following judgment.

May, 1899, term. May 29th, 1899, 1st judicial day.

Court convened Monday, May 29th, 1899, at 9 o'clock a. m., pursuant to the orders of the supreme court of Oklahoma.

Present: The Hon. Jno. L. McAtee sole judge presiding, C. V. Porter, sheriff, J. P. Renshaw, clerk, by Frank Worcester, deputy, Jno. L. McAtee Jr., stenographer, J. C. Corberand, crier.

Public proclamation of the opening of court having been announced, proceedings were had as follows:

May, 1899, term, June 3rd, 1899, 5th judicial day.

Among other things the following proceedings were had on this 3rd day of June, 1899, the same being the 5th judicial day of the May, 1899, term.

JOHN ROMIG
*vs.*
DON A. GILLETT. } #424.

And now this cause comes regularly on for hearing and the plaintiff is by the court granted leave of fifteen days in which to make and serve brief on defendant's counsel. And the said briefs are to be submitted to the court by June 20, 1899.

81 May, 1899, term, June 21st, 1899, 7th judicial day.

Among other things the following proceedings were had on this 21st day of June, 1899, the same being the 7th judicial day of the May, 1899, term.

JOHN ROMIG
*vs.*
DON A. GILLETT and MYRTLE GILLETT. } #424.

And now on this 21st day of June, 1899, the same being the 7th day of the May term of said court this cause coming on again to be heard upon the motion of the defendant, Myrtle Gillett to set aside the judgment of foreclosure in this cause and all the proceedings had thereunder upon the question reserved in the decision made and entered at the last term of this court upon said motion, it is further ordered and adjudged that Myrtle Gillett be restored to the possession of said premises, to wit: the east half of the northeast quarter of section eighteen (18) in township twenty-two (22) north of range six (6) west, save and except a strip of land eighty feet wide off of the west side of said tract of land from the north to the southern boundary thereof situated in the county of Garfield and Territory of Oklahoma, and that the plaintiff, John Romig and his grantee Daniel W. Harding are hereby commanded forthwith to quit and surrender to said Myrtle Gillett the full and complete possession of said premises and of each and every part thereof; and it is further ordered that unless the said John Romig and his grantee Daniel W. Harding has not quit and surrendered possession of said premises and of each and every part thereof prior to the expiration of fifteen days from this date that then upon a præcipe being filed therefor by the said Myrtle Gillett or her attorneys of record, an order shall be issued out of the office of the clerk of this court, and directed to the sheriff of this county, commanding him to forthwith remove the said John Romig and his grantee Daniel W. Harding and each of them and all
persons claiming by through or under them or either of them
82 from said premises and put the said Myrtle Gillett into possession thereof; and it is further ordered that said Myrtle Gillett have judgment against the plaintiff, John Romig, and the said Daniel W. Harding, for costs in this case expended, taxed at — dollars, to which the plaintiff and Daniel W. Harding excepts.

And the motion for a new trial heretofore filed herein by the plaintiff coming on to be heard the same was by the court overruled, to which action of the court the plaintiff then and there excepted.

And the motion for a new trial heretofore filed herein by Daniel W. Harding coming on to be heard the same was by the court overruled, to which action of the court in so overruling said motion, the said Daniel W. Harding then and there excepted.

And afterwards to wit: on the 24th day of June, 1899, the plaintiff, John Romig, filed his motion for new hearing on the motion of Myrtle Gillett for possession of land described herein, which motion was by the court considered and overruled, to which action of the court John Romig then and there duly excepted, and afterwards to wit: on the 24th day of June, 1899, the grantee of the plaintiff, Daniel W. Harding, files his motion for new hearing and affidavit in support thereof on the motions of the defendant Myrtle Gillett, which motion was by the court considered and overruled, to which action of the court the said Daniel W. Harding then and there duly excepted; and thereupon the plaintiff, John Romig and Daniel W. Harding each gave notice of appeal to the supreme court of the Territory of Oklahoma, and said plaintiff, John Romig and Daniel W. Harding were each by the court given thirty days' time to make and serve case-made for the supreme court of the Territory, and the defendant Myrtle Gillett was by the court given fifteen days thereafter to suggest amendments, and the case to be settled upon five days' notice.

83 And it was further ordered and agreed by the court that the plaintiff John Romig and Daniel W. Harding give an appeal bond in the total sum of one thousand dollars, conditioned as provided by law, and to be approved by the clerk of said court; upon the filing and approval of such bond no execution shall issue on said order until the determination of said cause in the supreme court.

May, 1899, term, June 24, 1899, 10th judicial day.

Among other things the following proceedings were had on this 24th day of June, 1899, the same being the 10th judicial day of the May, 1899, term.

JOHN ROMIG
*vs.*
DON A. GILLETT. } #424. Motion for New Trial.

Comes now plaintiff Harding by his attorney Houston and moves the court for a new trial of this cause, and the court being fully advised overrules the motion of plaintiff, to which plaintiff excepts.

And now comes plaintiff Romig by his attorney Temple, and moves the court for a new trial of this cause; and the court being fully advised in the premises overrules the motion of plaintiff Romig, to which ruling plaintiff's counsel excepts.

84 TERRITORY OF OKLAHOMA, } ss:
*Garfield County,* }

I, J. P. Renshaw, clerk of the district court, in and for the county and Territory aforesaid, do hereby certify that the above and foregoing is a full, true and correct copy of all the proceedings in the above-entitled cause, as the same appears of record in my office.

Witness my hand, and the seal of said court, hereto affixed, at my office in Enid, this 14th day of July, 1899.

J. P. RENSHAW,
[SEAL.] *Clerk District Court, 5th District, Territory of Oklahoma.*

Thereafter on the 24th day of June, 1899, the said John Romig and Daniel W. Harding filed their motions for a new hearing upon the order granting possession of said land to the plaintiff Myrtle Gillett, which motions are in words and figures as follows:

85 In the District Court of Garfield County, Oklahoma Territory.

JOHN ROMIG, Plaintiff,
*vs.*
DON A. GILLETT and MYRTLE GILLETT, Defendants. } Motion of Daniel W. Harding for New Hearing.

Comes now on this day Daniel W. Harding, and states to the court that he is the owner in fee-simple of the east half of the northeast quarter of section 18, township 22, north of range 6 west of Indian meridian, except a strip of 80 feet off of the west side from the north to the southern boundary. A copy of his deed is hereto attached as part hereof and marked Exhibit "A."

2. That by virtue of said title he went into the quiet and peaceable possession of said land, and has in good faith made permanent and valuable improvements thereon of the value of $2,000.00, and has paid taxes on said land to the value of $200.00.

3. That he never has had his day in court. Wherefore he prays that the judgment rendered upon the motion of Myrtle Gillett be set aside, and that a new hearing be granted him in this cause for the following reasons:

4. The motion filed in this cause is not sufficient to give the court jurisdiction in said cause.

5. The motion does not state facts sufficient to warrant the relief asked.

6. The defendant, Myrtle Gillett, has not tendered into court her answer to the original petition, showing a meritorious defense to the same, nor has she offered to pay the cost of said suit as by law required.

86 7. That there is no allegation in said motion that the said Myrtle Gillett has any defense to the action whatever, as by law required, or any title at this time to the land in controversy.

8. That said Myrtle Gillett does not state in her motion that she

did not know of said suit, judgment and sale, nor with diligence she was unable to learn of the same as by law required.

9. That the proceedings herein sought to be had, is barred by statute of limitation.

10. That the said Daniel W. Harding, is the owner in fee-simple of the land described in this action as herein mentioned and purchased the same from John Romig, the plaintiff in this action, for a valuable consideration, without notice of any defects, and is therefore an innocent purchaser and cannot be disturbed in his title and possession.

11. The land mentioned and specified in said judgment, having passed into the hands and possession of an innocent third party, cannot be reached or affected by a motion.

12. The land having been sold by a decree of the court, which decree of court, is in all things regular on its face, and the sale of the same being in all things regular and fully complying with the law, and which sale was by regular order and decree of this court, in all things duly confirmed, and by the purchaser at said sale, sold and transferred to the said Daniel W. Harding for a valuable consideration, cannot be set aside upon and in the manner sought to be in this proceeding.

13. The service and notice, under which said judgment was rendered and said land sold, is and was amply sufficient, and fully complies with all requirements of the law, and the decree or judgment rendered thereunder, was not void, and could not be set aside without evidence *de hors* the record.

87 14. The judgment of this court rendered in said cause, induced the said Daniel W. Harding to purchase the said real estate, with the belief that he was obtaining property legally sold, and in the absence of fraud on his part he became vested with a title thereby, which this same court should not divest him of.

15. There was no fraud or collusion or privity between Daniel W. Harding and the plaintiff, John Romig, in obtaining the said judgment, or procuring the sale thereunder.

Wherefore the said Daniel W. Harding prays that a new hearing be granted him.

L. N. HOUSTON,
*Att'y for Daniel W. Harding.*

88 EXHIBIT "A."

Know all men by these presents, that John Romig and Angie A. Romig, his wife, of the county of Garfield and Territory of Oklahoma for and in consideration of the sum of nine hundred and fifty dollars in hand paid do hereby grant, bargain, sell, convey and confirm unto Daniel W. Harding, of the county of Garfield and Territory of Oklahoma, the following-described real estate, situate in —— in Garfield county and Territory of Oklahoma, to wit:

The east half of the northeast quarter of section eighteen (18), township twenty-two (22), range six (6) west of I. M. except a strip

of 80 feet off of the west side from the north to the southern boundary.

And we do hereby covenant with the said Daniel W. Harding and his heirs and assigns that we are lawfully seized of said premises, that they are free from incumbrances, that we have good right and lawful authority to sell the same, and we do hereby covenant to warrant and defend the title to said premises against the lawful claims of all persons whomsoever, and I the said Angie A. Romig hereby relinquish all right of every kind that I may have or be entitled to in and to the above-described premises, as the wife of said John Romig.

Signed this 9th day of March, 1897.

JOHN ROMIG.
ANGIE A. ROMIG.

In presence of—
GEORGE THOMPSON.
L. B. SAWYER.

89 TERRITORY OF OKLAHOMA, } ss:
*Garfield County,* }

Before L. B. Sawyer, a notary public, in and for the above-named county and Territory, on this 9th day of March, 1897, personally appeared John Romig and Angie A. Romig, his wife, and are to me known to be husband and wife, and executed the above conveyance of land to me known not to be the homestead of grantors, and each for themselves acknowledged the execution thereof to be their free and voluntary act for the purposes named.

Witness my hand and official seal the date above written.

L. B. SAWYER,
*Notary Public.*

[SEAL.]

My commission expires December 11, 1897.

(Endorsed:) Warranty deed. From John Romig and Angie A. Romig to Daniel W. Harding.

TERRITORY OF OKLAHOMA, } ss:
*Garfield County,* }

Entered in numerical index and filed for recording in the register of deed's office of said county on the 10th day of March, 1897, at 1.40 p. m. o'clock and recorded in Book 5 of Deeds at page 170.

Fee $1.00.

J. L. REGER,
*Register of Deeds.*

[SEAL.]

90 In the District Court of Garfield County, Oklahoma Territory.

JOHN ROMIG, Plaintiff,
*vs.*
DON A. GILLETT and MYRTLE Gillett, Defendants.

Affidavit of Daniel W. Harding in Support of Motion for New Hearing.

TERRITORY OF OKLAHOMA, *Garfield County*, } *ss:*

Daniel W. Harding, of lawful age, being first duly sworn, on his oath says; That on or about the 9th day of March, 1897, I purchased, for a valuable consideration of plaintiff, John Romig, the east half of the northeast quarter of section 18, township 22 north of range 6 west I. M. except a strip of land 80 feet wide off of the west side from the north to the southern boundary, and am now the owner thereof. That prior to purchasing the same of said Romig, I employed Attorney Chas. Moore, as my attorney, to examine the title to said tract, and was informed by him that said plaintiff, John Romig, held good and complete title to said land, and after thoroughly investigating said title and believing that said plaintiff John Romig, was vested with full, good and complete title to said land, I purchased the same of said Romig and received his warranty deed therefor, and paid in consideration for the same, and took full and complete possession of said tract. That at the date of said purchase, said tract of land was wholly unimproved prairie land, and believing my title thereto perfect, I have since built thereon three residences, all of which are now thereon, and have made various other permanent and valuable improvements thereon, and have paid several years' taxes thereon, and have resided thereon for several years, and now reside thereon, and since purchasing and taking full possession thereof, my said title, right and possession to said land has never been questioned or disputed, until in May, 1898, one Myrtle Gillett, caused notice served on me in this cause.

91 I further state that I purchased said real estate in good faith and paid the purchase price, believing I was obtaining full and complete title to said described property. And further, there was no fraud or collusion or privity between said John Romig and myself, in obtaining said judgment, obtained by said John Romig, nor did I know that there was any action had between said John Romig and said defendants, involving this tract of land, or any other, until I caused the title to said tract to be examined, at the time I purchased the same; and in purchasing said land, and parting with the consideration therefor, and in making the valuable improvements that I have made thereon, I relied upon the orders and decrees of the court made in said original cause, and believing the same regular and in full compliance with the law.

DANIEL W. HARDING.

Subscribed and sworn to before me this 24th day of June, 1899.

J. P. RENSHAW,
[SEAL.] *Clerk of the District Court.*
By FRANK WORCESTER, *Deputy.*

Filed June 24, 1899.

J. P. RENSHAW, *Clerk,*
By FRANK WORCESTER, *Deputy.*

(Endorsed:) No. 424. John Romig, plaintiff, *vs.* Don A. Gillett, and Myrtle Gillett, defendants. Motion of Daniel W. Harding for new hearing. Filed June 24, 1899. J. P. Renshaw, clerk, by Frank Worcester, deputy. L. N. Houston, attorney for Daniel W. Harding.

92 In the District Court of Garfield County, Oklahoma Territory.

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|---|---|
| JOHN ROMIG, Plaintiff, *vs.* DON A. GILLETT and MYRTLE GILLETT, Defendants. | Motion of John Romig for New Hearing upon the Motion of Myrtle Gillett, Filed on the 13th Day of April, 1899. |

And now on this day comes John Romig, plaintiff, and moves the court to vacate the order and decree, granting said motion, wherein the court ordered the defendant, Myrtle Gillett, restored to the possession of the east half of the northeast quarter of section 18, township 22 north of range 6 west, I. M. except a strip of land 80 feet wide off of the west side, from the north to the southern boundary, on the — day of June, 1899, and to grant said plaintiff a new hearing on said motion, for the following causes, which affect materially the plaintiff's substantial right, to wit:

1. Said decree and order is not sustained by sufficient evidence.
2. Said decree and order is contrary to law.
3. Errors of law occurring at the hearing, and excepted to by the plaintiff, at the time.
4. Because the records and the papers in this cause show that the mortgage and note described in the mortgage, is and was long past due and unpaid, at the commencement of the original action, and the defendant has not tendered or caused to be tendered the amount of the principal, interest and taxes, before filing her motion herein, nor at any other time.
5. The motion filed in this cause, is not sufficient to give the court jurisdiction in this cause.

D. D. TEMPLE,
*Attorney for John Romig.*

93 (Endorsed:) No. 424. John Romig, plaintiff, *vs.* Don A. Gillett and Myrtle Gillett, defendants. Motion of John Romig for new hearing. Filed June 24, 1899. J. P. Renshaw, clerk. D. D. Temple, attorney for plaintiff.

The court after due consideration, doth overrule said motions, to which rulings of the court the defendant-, John Romig and Daniel W. Harding excepted, and prayed an appeal to the supreme court, which appeal was granted by the court.

94 THE TERRITORY OF OKLAHOMA, } ss:
*Garfield County,* }

I, J. P. Renshaw, clerk of the district court, in and for the Territory and county aforesaid, do hereby certify that the above and foregoing case-made, includes the original papers, as follows: Petition of John Romig against Don A. Gillett and Myrtle Gillett, the summons, the affidavit for order of publication, the notice of publication, the order of sale, appraisement, return of sheriff, motion for confirmation of sale, the motion of Myrtle Gillett to vacate judgment, affidavit of John Romig, motion of John Romig to strike from the files Myrtle Gillett'- motion, the motion of Daniel W. Harding to strike from the files the motion of Myrtle Gillett to vacate said judgment, the motion of Daniel W. Harding asking to withdraw motion and to file motion, the motion of Myrtle Gillett asking for possession of said lands in her motion set forth, the several and separate motions for a new trial, together with the rulings of the court on the several motions, and all of the journal entries in said cause made, also all proceedings had or done, by or in behalf, or against said Myrtle Gillett in this court.

Witness my hand, and the seal of said court, hereto affixed, at my office in Enid, this 14th day of July, 1899.

J. P. RENSHAW,
[SEAL.] *Clerk District Court, 5th District, Territory of Oklahoma.*

Filed December 21, 1899.

BENJ. F. HEGLER,
*Clerk Supreme Court.*

95 We, the undersigned attorneys for Myrtle Gillett, do hereby accept service of the above and foregoing case-made, on this 15 day of July, 1899.

ANDERSON & RUSH,
*Attorneys for Myrtle Gillett.*

Filed December 21, 1899.

BENJ. F. HEGLER,
*Clerk Supreme Court.*

96 Before the Hon. John L. McAtee, judge of the 5th judicial district of Oklahoma Territory.

MYRTLE GILLETT, Plaintiff,
*vs.*
JOHN ROMIG and DANIEL W. HARDING, Defendants.

Be it known that I, John L. McAtee judge of the 5th judicial district, Garfield county, Oklahoma Territory, (of which district Garfield

county composes a part) do hereby certify, that the above and foregoing case-made, was served in due time, and contain- the original papers used in said case, together with all the journal entries, and orders made in said case, also in the case of Myrtle Gillett against John Romig and Daniel W. Harding, to vacate judgment rendered on the 15th day of April, 1899, and the 21st day of June, 1899, and there being.

In witness whereof, I here*by* set my hand as such judge, this 2 day of September, 1899, and order that the same be attested by the clerk of this court, with his official seal.

JNO. L. McATEE, *Judge.*

Attest:

[SEAL.] J. P. RENSHAW, *Clerk.*

Filed Dec. 21, 1899.

BENJ. F. HEGLER,
*Clerk Supreme Court.*

Endorsed: Filed Sept. 2, 1899. (Seal.) J. P. Renshaw, clerk.

97 *Warranty Deed.*

Know all men by these presents: that Don A. Gillett, a single man, of the county of "O" Garfield, in Oklahoma Territory, for and in consideration of the sum of two thousand and no/100 dollars in hand paid, do hereby grant, bargain, sell, convey and confirm unto Myrtle A. Gillett of the county of Kingfisher and — of —— the following-described real estate, situated in "O" Garfield *in* county and Territory of Oklahoma, to wit: The east half (E. ½) of the northeast quarter (N. E. ¼) of section eighteen (18) township twenty-two (22) north of range six (6) W. I. M. save and except a strip of land eighty (80) feet wide off from the west side of said tract of land from the north boundary to the south boundary thereof, said land containing eighty (80) acres, less said eighty-feet strip above described and set forth.

And I do hereby covenant with the said Myrtle A. Gillett and her heirs and assigns that he is lawfully seized of said premises; tha*y* they are free from incumbrance except a mortgage of $700.00 now on said land which Myrtle A. Gillett does not assume; that he has good right and lawful authority to sell the same, and he does hereby covenant to warrant and defend the title to said premises against the lawful claims of all persons whomsoever.

And I, the said —— —— hereby relinquish all right of every kind that I may have or be entitled to, in and to the above-described premises, as the — of the said —— ——.

Signed this 6, day of February, 1895.

DON A. GILLETT.

In presence of
P. B. GILLETT.

98 TERRITORY OF OKLAHOMA, } ss:
*Garfield County,* }

Before C. L. Greer, a register of deeds, in and for the above-named county and Territory, on this 6 day of February, 1895, personally appeared Don A. Gillett, to me known to be single, and executed the above conveyance of lands and for himself acknowledged the execution thereof to be his free and voluntary act for the purposes named.

Witness my hand and official seal, the date above written.

C. L. GREER,
*Register of Deeds.*

[SEAL.]

Endorsed: From —— —— to —— ——.

TERRITORY OF OKLAHOMA, } ss:
*Garfield County,* }

Entered in numerical index and filed for record in the register of deeds' office of said county, the 6 day of February, 1895 at 5.30 p. m. o'clock and recorded in Book 5 of Deeds, on page 80.

C. L. GREER,
*Register of Deeds.*

99 (Endorsed:) 953. Myrtle Gillett *vs.* John Romig and Daniel W. Harding. Case-made and petition in error. Filed Dec. 21, 1899. Benj. F. Hegler, clerk supreme court.

100 And on the sixth day of June 1900, the same being the third judicial day of the June, 1900, term of said court, the following proceeding was had, to wit:

JOHN ROMIG ET AL., Plaintiff- in Error,
*vs.*
MYRTLE GILLETT, Defendant in Error. } No. 953.

And now oral argument is waived in this cause and the same is taken on record and briefs.

101 And on the thirtieth day of June, 1900, the same being a judicial day of the June, 1900, term of said court, the following proceeding was had, to wit:

JOHN ROMIG ET AL., Plaintiffs in Error,
*vs.*
MYRTLE GILLETT, Defendant in Error. } No. 953.

And now this cause somes on for final decision by the court, upon the argument and briefs submitted therein.

And the court having duly considered the same and being fully advised in the premises finds that the judgment of the lower court in this cause should be affirmed at the cost of plaintiffs in error.

It is therefore ordered and adjudged by the court that the judgment of the lower court in this cause be and the same is hereby affirmed at the cost of plaintiffs in error.

Opinion by Hainer, J. All the justices concurring except McAtee, J., not sitting.

102 And on the thirtieth day of June, 1900, the same being a regular judicial day of the June, 1900, term of said court, the following opinion was rendered in said cause, to wit:

103 In the Supreme Court of the Territory of Oklahoma, June Term, 1900.

Filed June 30th, 1900.

JOHN ROMIG and DANIEL W. HARDING, Plaintiffs in Error,
*vs.*
MYRTLE GILLETT, Defendant in Error. } No. 953.

*Syllabus.*

I. Where a party seeks to bring a defendant into court upon service by publication under the code, he must strictly comply with the requirements of the statute, and unless this be done the judgment will be void for want of jurisdiction of the person of the defendant.

II. An affidavit made by the plaintiff's attorney upon information and belief merely, stating that the defendants are non-residents of the Territory, and that service of summons cannot be had upon them within said Territory, is wholly insufficient to authorize an order for publication of the summons, and the publication founded upon such an affidavit is absolutely void, and every subsequent proceeding in the case based upon such service, including the judgment, the order of sale, the confirmation of the sale, and the sheriff's deed, are necessarily void for want of jurisdiction.

Error from the district court of Garfield county.

Jno. L. McAtee, trial judge.

Affirmed.

D. D. Temple, L. N. Houston, and Buckner and Son for plaintiffs in error.

George P. Rush for defendant in error.

*Statement of the Case.*

It appears from the record and the briefs of counsel, that on the second day of February, 1895, Don A. Gillett made, executed and delivered to John Romig his promissory note for $700.00, payable two years after date, bearing interest at the rate of twelve per cent.

per annum, payable semi-annually in advance. This note was secured by a real-estate mortgage executed by the said Don A. Gillett upon the east half of the northeast quarter of section eighteen, township twenty-two, range six west of the Indian meridian. It further appears that on the sixth day of February, 1895, Don A. Gillett executed a deed to one Myrtle Gillett for said land, subject to the above-described mortgage. It further appears from the record that on the 11th day of March, 1896, John Romig brought an action in the district court of Garfield county against Don A. Gillett and Myrtle Gillett to recover judgment against the said Don A. Gillett for $749.00, with interest and attorneys' fees, and to foreclose said mortgage. The petition contained the following averment: "Plaintiff further states that said defendant Myrtle Gillett has or claims to have some interest or lien upon said premises, or part thereof, and if any she may have, it is junior, inferior and subject to plaintiffs' mortgage deed."

On June 2nd, 1896, John Romig filed in the district court his affidavit for summons by publication, which affidavit is as follows:

"*Affidavit for Publication.*

"TERRITORY OF OKLAHOMA, } ss:
*Garfield County,* }

"In the District Court in the County and Territory Aforesaid.

"JOHN ROMIG, Plaintiff,
*vs.*
"DON A. GILLETT and MYRTLE GILLETT, Defendants. } Affidavit.

"D. D. Temple being duly sworn according to law, says that he is the attorney for the above-named plaintiff, and that on the — day of March 1896, said plaintiff filed in the district court aforesaid a petition against said defendants, showing that said defendant Don A. Gillett heretofore executed and delivered to said plaintiff John Romig, a certain mortgage deed, conveying the following-described real estate, to wit: the east half of the northeast quarter of section eighteen, township twenty-two, range six west of the Indian meridian, lying and situated in the county of Garfield and Territory of Oklahoma, to secure the payment of a certain sum of money mentioned in said mortgage and in said petition. That the condi-
104 tions of said mortgage had been broken, and said mortgage had become absolute. That said plaintiff is the legal owner and holder of said indebtedness and said mortgage. That said defendants claim a lien upon or right, title, estate, interest, or equity of redemption, in or to said premises or some part thereof subject and inferior to the rights of said plaintiff, and praying judgment for the amount due said plaintiff on the said indebtedness for the foreclosure of said mortgage. That the lien, claim, interest, estate, and equity of redemption of said defendants in and to said premises, if any they

may have, be determined and settled, and that said plaintiff be adjudged to have the first lien and claim upon said premises.

"That said premises be ordered sold according to law, and the proceeds applied to the payment of said indebtedness due said plaintiff, and that said defendants be forever barred and foreclosed of and from all right, title, estate, interest, property and equity of redemption in or to said premises or any part thereof.

"The affiant further says that the said action is brought for the sale of the real estate under the aforesaid mortgage.

"Affiant further says that he is unable and that the plaintiff is unable by using due diligence, to obtain service of summons on the said defendants within the Territory of Oklahoma.

"Affiant further states that on the — day of March 1896, he caused a summons to be issued in said cause for said defendants, directed to the sheriff of Garfield county, Oklahoma Territory. Sheriff made return, 'Def'ts not found in my county.'

"Affiant further states upon information and belief that the said def'ts Don A Gillett and Myrtle Gillett are non-residents of the Territory of Oklahoma, and that service of summons cannot be made on the said def'ts Don A. Gillett and Myrtle Gillett within the said Territory of Oklahoma, and that said pl'ff wishes to obtain service upon said def'ts by publication, and further affiant saith not.

"D. D. TEMPLE.

"Subscribed and sworn to in my presence before me this 2nd day of June, 1896.

"J. C. McCLELLAND, *Clerk*,

[SEAL.] "By W. B. JOHNSON, *Deputy*."

On the 18th of December, 1896, judgment was rendered in favor of John Romig for the amount sued on; the mortgage was foreclosed, and the sale of the land ordered; that on February 20, 1897, said sale was by the court confirmed, and an order made requiring the sheriff to execute a deed to the purchaser, and in obedience to such order on March 9, 1897, the sheriff executed a deed to the plaintiff in error John Romig for said premises. It appears that thereafter on the 9th of March, 1897, John Romig, for a valuable consideration, sold said premises to the plaintiff in error, Daniel W. Harding. That on September 17th, 1898, Myrtle Gillett, the defendant in error, filed her motion to vacate and set aside the judgment upon the following grounds: (1) That the court had no jurisdiction of the defendant Myrtle Gillett. (2) Because said court had no jurisdiction to render said judgment. (3) That the defendant was at all times during the pendency of said action a resident of the Territory of Oklahoma, and that no summons was ever served upon her. (4) That the service of publication was void.

In support of this motion to vacate the judgment, the following affidavit was filed by the defendant in error, Myrtle Gillett. (Omitting caption and jurat):

"Comes now the defendant Myrtle Gillett and being sworn says, that on the 11th day of March, 1896, and for a long time prior thereto

she was, ever since has been, and now is a resident of the county of Kingfisher and Territory of Oklahoma, and resided upon the real estate in said county described as follows, to wit, S. W. ¼, section 13, twp. 19, range 7, joining Hennessy, O. T.

"That from said 11th day of March, 1896, until after the 18th day of June 1896, said Myrtle Gillett was personally present upon said real estate, except when she was temporarily absent when visiting or transacting business in the neighborhood, and ever since said last date, except —, have never been absent from home but for one week in July, 1895, since we returned from living in Enid in 1893 and 1894 to our present home.

"That the said Myrtle Gillett had resided upon said real estate for more than five years prior to the said 11th day of March, 1896, and her home and residence was well known to the people of said neighborhood and county, and to a large number of persons in Garfield county, O. T.

"That this affiant had no knowledge of the institution or prosecution of the above-entitled cause until long after the date of sale of land, and had no actual notice of the institution and pendency of said action."

The plaintiffs in error offered in opposition to the showing of Myrtle Gillett the affidavits of John Romig and Daniel W. Harding which are as follows: (Omitting caption and jurat):

"John Romig, of lawful age being first duly sworn, on his oath says: That he is the plaintiff in the above-entitled action; that prior to the time the petition in said entitled action was filed I employed D. D. Temple as my attorney to foreclose the mortgage recited in said plaintiff's petition, and as my attorney he was authorized to do all that was necessary to be done in said cause.

"Affiant further says that he is not, nor never has been acquainted with the defendant named Myrtle Gillett, nor any person by the name of Myrtle Gillett, nor does he know that there is such a person, that no person of that name ever offered to pay the mortgage mentioned in plaintiff's petition, nor any of the interest on said note, nor had they paid any taxes on said land mentioned in said mortgage.

"That the only information concerning such a person this affiant had learned of during the proceedings in foreclosure, is that a party of that name resided in the State of Kansas, and not within the Territory of Oklahoma."

"Daniel W. Harding of lawful age, being first duly sworn, on his oath says: That on the 9th day of March 1897, for a valuable consideration I purchased in good faith of John Romig, plaintiff in the above-entitled cause, the east half of the northeast quarter of section eighteen, township twenty-two, range six west of the Indian meridian, except a strip of eighty feet off of the west side from the north to the southern boundary. And that ever since the date of the purchase of said described tract of land from said John Romig, and at the time said notice to set aside said judgment was served on this affiant, as well as up to the present time, this affiant has been in full

and complete possession of said land and the owner and
105 holder of the same, and without any knowledge of any rights or claim of any person other than he, the said John Romig, his grantor, who held the same under a sheriff's sale and deed prior to the purchase of the same by this affiant. And affiant further says, that the deed conveying such tract of land to this affiant by said John Romig is a general warranty deed, and is recorded on page 170 in Book Five of Deeds in the office of the register of deeds of Garfield county, Territory of Oklahoma."

The court sustained the motion to vacate and set aside the judgment as to the defendant Myrtle Gillett, on the ground that the judgment is void for want of jurisdiction, and that all subsequent proceedings thereunder were wrongful and void, and ordered that the plaintiff be restored to the possession of the premises from which she was wrongfully dispossessed. From this ruling and order of the court the plaintiffs in error bring the case here.

*Opinion of the Court by Hainer, J.*

We think that the court properly sustained the motion to vacate and set aside the judgment on the ground that the affidavit for service of publication was wholly insufficient, and therefore the court had no jurisdiction of the person of the defendant in error. The only service had in this case was by publication. The defendant in error, Myrtle Gillett, filed no pleading and made no appearance in the action. Judgment was entered against her by default. The affidavit in this case was made by the attorney of record of the plaintiff. It states that, "upon information and belief that the said defendants Don. A. Gillett and Myrtle Gillett are non-residents of the Territory of Oklahoma, and that service of summons cannot be made on the said defendants Don A. Gillett and Myrtle Gillett within the said Territory of Oklahoma."

The affidavit proves nothing. It does not state facts, but only affiant's belief that the defendants were non-residents of the Territory of Oklahoma. Such a statement is but a mere hearsay declaration of counsel for the plaintiff, and does not amount to legal proof.

In Hefern *vs.* Davis, 10 Wis. 443, it was held by the supreme court of Wisconsin that:

"Statements on information and belief merely, that the defendant's residence cannot be ascertained, or that his whereabouts cannot be discovered, are not sufficient evidence of non-residence in the State to authorize an order of publication of the summons. Such statements are but hearsay, and do not amount to legal proof."

The affidavit being insufficient the court had no jurisdiction of the defendant in error. We think this defect in the affidavit is fatal to the service by publication. The affidavit is the basis upon which jurisdiction is obtained. The plaintiff has no authority to obtain service by publication until after he has filed the proper affidavit, and without such affidavit the publication is absolutely void. Where a party seeks to bring a defendant into court by service by publication under the code, he must strictly comply with the re-

quirements of the statute, and unless this be done the judgment will be vacated and set aside for want of jurisdiction of the person of the defendant. It must follow that where the service is absolutely void, every subsequent proceeding including the judgment, the order of sale, the confirmation of the sale, and the sheriff's deed, must necessarily be void.

In Shields *vs.* Miller, 9 Kan. 390, the supreme court of that State declared that:

"In an action to foreclose a mortgage on real estate, service may be made upon a defendant not residing within the State, by publication; but before such service can be made, an affidavit must be filed showing that service cannot be made personally on the defendant within the State. And where a service by publication has been made in such a case, without said affidavit being first filed, the service is void; and every subsequent proceeding in the case founded on such service, including the judgment, the execution or order of sale, the sale, and the sheriff's deed, must also necessarily be void."

The same rule was also announced by the supreme court of Kansas in the cases of:

Harris *vs.* Claffin, 36 Kan. 543; and, Grouch *vs.* Martin, 47 Kan. 313.

The judgment of the district court is therefore affirmed at the costs of the appellants.

All the justices concurring, except McAtee, J., who having tried the cause in the court below not sitting.

106 In the Supreme Court of Oklahoma Territory.

JOHN ROMIG and DANIEL W. HARDING, Plaintiffs in Error,
*vs.*
MYRTLE GILLETT, Defendant in Error.

*Petition for Rehearing.*

Comes the petitioners and moves the court to grant them a rehearing in this cause for the following reasons:

First. Daniel W. Harding, one of the petitioners, is an innocent purchaser of the land in controversy for a valuable consideration and is now in possession of said land and has been for three years last past under said purchase and has made lasting and valuable improvements on said land of the value of five thousand dollars. (See case-made pages 53 and 60.) We think the court has overlooked sections 3955, 4468, 4360 and 1640 of the Oklahoma Statutes, 1893. Section 3955 reads in part as follows: "But the title to any property the subject of the judgment or order sought to be opened which by it, or in consequence of it shall have passed to a purchaser in good faith shall not be affected by any proceedings under this section."

Sec. 4360 reads: "If any judgment or judgments in satisfaction of which any lands or tenements are sold shall at any time there-

after be reversed, such reversal shall not defeat or affect the title of the purchaser." See

Howard *v.* Entreken, 24 Kan. 429.
Walkenhorst *v.* Lewis, 24 Kan. 426.
Jones *v.* Lapham, 15 Kan. 546.

Second. This not being a personal judgment but a judgment against the land only, the court had jurisdiction. The judgment and sale are not void.

That the judgment is not void we call the attention of the court to the following authorities which we think must have been overlooked:

107 In Larimer *v.* Krogle, 43 Kan., 349, Judge Valentine says: "It is the notice published that gives the court jurisdiction, not the affidavit for the notice." On page 348, *id.*, he says "that the affidavit and all the matters set up in it for an order of publication may be false, yet the judgment is not void." On page 349, *id.*, the court again says, "If the notice published is correct, that gives the court jurisdiction."

Head *v.* Daniels, 38 Kan., 7, the court says, "that if any part of the affidavit for notice is good the judgment is not void."

Washburn *v.* Buchanan, 34 Pac., 1049.
Decorat *v.* Dolan, 35 Pac., 72.
Denman *v.* McGuire, 101 N. Y., 161.
Quarles *v.* Abbott, 102 Ind., 233.
Jackson *v.* State, 104 Ind., 516.
Essig *v.* Lowe, 120 Ind., 239.
Ballinger *v.* Tarball, 16 Iowa, 491.
Odgen *v.* Walters, 12 Kan., 282.

Third. It will be seen on pages 63, 82, and 83 case-made, an order was made to put Myrtle Gillett into the possession of the land, which we claim cannot be done. The petitioner, Daniel W. Harding, having gone into possession under his purchase he cannot be ejected or dispossessed until the mortgage and all expenses have been fully paid.

Probst *v.* Brock, 10 Wall., U. S. 519.
Teadman Equity Jurisprudence, sec. 443.
Evans *v.* Pike, 118 U. S., 241.

Although the foreclosure may be defective, Harding being in possession under his purchase is not a trespasser and cannot be dispossessed until he is paid in full not only the amount due on the mortgage but for all improvements made in good faith on the land.

Jones on Mortgage, vol. 2, sec. 1678 and 1680.
Sedgwick & Wright on Trial of Land Titles, sec. 341.
Vohees *v.* Jackson, 10 Pet. (U. S.) 449.
Blair *v.* Ruard, 18 Ill., App., 477.
Gillett *v.* Eaton, 6 Wis., 33.
108 Tallman *v.* Ely, 6 Wis., 244.
Stark *v.* Brown, 12 Wis., 639.
Hennessey *v.* Farrell, 20 Wis., 46.
Cook *v.* Cooper, 18 Oregon, 142.

Wherefore petitioner prays that a rehearing be granted in this cause and for other relief.

D. D. TEMPLE,
L. N. HOUSTON, AND
BUCKNER & SON,
*Attorneys for Plaintiff in Error.*

July 13, 1900.

It is ordered that mandate in this case be stayed until Sept. 4th, 1900.

JNO. H. BURFORD,
*Chief Justice.*

Endorsed: 953. Romig *et al.*, *vs.* Gillett. Stay of mandate. Filed Jul- 13, 1900. Benj. F. Hegler, clerk supreme court.

109 And now on the thirteenth day of July, 1900, the following order of stay was made and entered in said cause, to wit:

JOHN ROMIG ET AL., Plaintiffs in Error,
*vs.*
MYRTLE GILLETT, Defendant in Error. } No. 953.

July 13, 1900.—It is ordered that mandate in this case be stayed until September 4th, 1900.

JNO. H. BURFORD,
*Chief Justice.*

110 And on the fourth day of September, 1900, the same being a regular judicial day of the June, 1900, term of said court, the following proceeding was had, to wit:

JOHN ROMIG and DANIEL W. HARDING, Plaintiffs in Error,
*vs.*
MYRTLE GILLETT, Defendant in Error. } No. 953.

Comes now C. R. Buckner, and by leave of court in support of his motion for rehearing, files additional authorities herein.

111 And on the sixth day of September, 1900, the same being a regular judicial day of the June, 1900, term of said court, the following proceeding was had, to wit:

JOHN ROMIG ET AL., Plaintiffs in Error,
*vs.*
MYRTLE GILLETT, Defendant in Error. } No. 953.

And now this cause comes on for decision by the court upon the motion of plaintiffs in error for a rehearing, and the additional authority in support thereof, and the suggestions in opposition thereto. And the court having duly considered the same, and having been

fully advised in the premises, find that the petition for rehearing herein should be denied.

It is therefore ordered and adjudged by the court, that the petition for rehearing herein be and the same is hereby denied, at the cost of appellants.

112 *Certificate of Clerk.*

UNITED STATES OF AMERICA, *Territory of Oklahoma*, } ss:

In the Supreme Court of Oklahoma Territory.

JOHN ROMIG and DANIEL W. HARDING, Appellants, vs. MYRTLE GILLETT, Appellee. } No. 953.

I, Benj. F. Hegler, clerk of the supreme court of the Territory of Oklahoma, do hereby certify that on the 15th day of September, 1900, a mandate was issued, in conformity to law, to the district court of Garfield county of the fifth judicial district of the Territory of Oklahoma, sitting in and for Garfield county, affirming a judgment of said district court entered in the clerk's office of the said district court on the 21st day of June, 1899.

On the 29th day of September, 1900, an appeal was allowed by the supreme court of said Territory to the Supreme Court of the United States, for the review of the judgment and order of the supreme court of said Territory heretofore referred to, signed by Honorable John H. Burford, chief justice of the supreme court of Oklahoma Territory, and issued out of the clerk's office of the supreme court of said Territory, giving the appellants sixty days in which to perfect their appeal from the judgment of the supreme court of said Territory.

That afterward, to wit: at the October term, 1900, of said United States Supreme Court, as evidenced by a mandate therefrom, which said mandate bears date December 28, 1900, said appeal was docketed and dismissed with costs.

That afterward, to wit: on the 22d day of January, 1901, a second appeal of said cause was granted by the Hon. Bayard T. Hainer, associate justice of the supreme court of said Territory, and issued out of the clerk's office of the supreme court of said Territory, giving the appellant- thirty days in which to perfect said second appeal from said judgment of said supreme court of said Territory.

113 That afterward, to wit: January 25, 1901, the supersedeas bond herein was duly filed, approved and signed by the Honorable Bayard T. Hainer, associate justice as aforesaid, and a certified copy of the citation in this cause was duly served on the attorney for appellee on the 8th day of February, 1901.

Seal Supreme Court, Territory of Oklahoma.

In testimony whereof, I have caused the seal of said court to be hereunto affixed at the city of Guthrie in the Territory of Oklahoma, on this the 16th day of February A. D. 1901.

BENJ. F. HEGLER,
*Clerk Supreme Court of Oklahoma Territory.*

114 UNITED STATES OF AMERICA, *Territory of Oklahoma,* } ss:

JOHN ROMIG and DANIEL W. HARDING, Appellants,
*vs.*
MYRTLE GILLETT, Appellee. } No. 953.

I, Benj. F. Hegler, clerk of the supreme court of the Territory of Oklahoma, do hereby certify that the foregoing one hundred and fourteen written and printed pages, numbered from 1 to 114, inclusive, to be a full, true and correct copy of the record and proceedings in the above and therein entitled cause as the same remain of record and on file in the office of the clerk of the supreme court of the Territory of Oklahoma, and that the same constitutes the case-made or transcript annexed to the citation herein, except precipe for summons, summons in error and return thereof, and notice of oral argument.

I further certify that the cost of the foregoing transcript is $39.00 and that said amount was paid by Daniel W. Harding, appellant herein,

I further certify that the costs made in this court amount to the sum of $32.55, which have been paid by the appellant, Daniel W. Harding.

Seal Supreme Court, Territory of Oklahoma.

In testimony whereof, I have caused the seal of said court to be hereunto affixed at the city of Guthrie in the Territory of Oklahoma, on this the 16th day of February, A. D. 1901.

BENJ. F. HEGLER,
*Clerk Supreme Court, Oklahoma Territory.*

[Endorsed:] 953. John Romig *et al. vs.* Myrtle Gillett. Appeal to U. S. Sup. Ct. from sup. ct. Okla. Terr'y.

Endorsed on cover: File No. 18,069. Oklahoma Territory supreme court. Term No. 263. John Romig & Daniel W. Harding, appellants, *vs.* Myrtle Gillett. Filed March 5th, 1901.

# Supreme Court of the United States.

**OCTOBER TERM, 1900.**

*No. 584.*

JOHN ROMIG AND DANIEL W. HARDING,
APPELLANTS,

*vs.*

MYRTLE GILLETT, APPELLEE.

## Brief on Behalf of Appellants in Resistance of Motions to Quash Supersedeas and to Dismiss Appeal.

STATEMENT.

The appellee, Myrtle Gillett, has filed herein two motions—one to quash the *supersedeas*, because it is alleged the same was not given within sixty days from the date of the entry of the decree appealed from, and the other because it is alleged less than the jurisdictional sum is involved in the appeal.

The attention of the court is, at the outset, especially invited to the fact that, while appellee invokes the summary disposal of the case by dismissal before the same shall have

been heard on the merits, the parts of the record necessary to be considered by the court in reaching a proper conclusion have not been printed for use in connection with the motion, and therefore the court has not before it, without referring to the manuscript record, the real record facts essential to the proper determination hereof.

FACTS.

Don A. Gillett (grantor of appellee) executed and delivered to John Romig (party appellant) a certain deed of mortgage (duly recorded same day, February 2, 1895) upon certain real estate (described), being the property here in controversy, but being then unimproved prairie land in Oklahoma Territory, to secure the payment of a certain promissory note to said Romig in the sum of $700, and interest thereon, costs, etc.

On February 6, 1895, Don A. Gillett conveyed said property, subject to said mortgage, to Myrtle Gillett (appellee). Thereafter she made default, and, the conditions of the mortgage having been thus broken, suit in foreclosure was instituted by Romig against both said Don A. and Myrtle Gillett (*R., 17*). Summons to both defendants duly issued to the sheriff of the county March 12, 1896, who made return thereto of "*non est*" (*R., 25*).

Thereupon plaintiff's attorney filed affidavit in supposed compliance with the requirements of law in that behalf, and obtained an order of publication against defendants (*R., 27, 28*). Proof of such publication was thereafter filed, and judgment in foreclosure subsequently entered against defendants December 18, 1896; order of sale thereunder January 20, 1897, etc. (*R., 36–39*); order of sale executed by sheriff and land sold at public auction to John Romig February 23, 1897 (*R., 39, 40*); sale confirmed by the court March 1, 1897, and order entered directing that Romig be put into possession of the land (*R., 44–46*). On March 9,

1897, sheriff duly conveyed to Romig, and deed recorded March 10, 1897 (*R., 47–50*).

It is thus seen that, so far as disclosed by the records of said court in which said proceedings in foreclosure were had, the title to and possession of the property become vested in Romig on March 9, 1897.

On that date (March 9, 1897) Daniel W. Harding (party appellant), having had the several orders and decrees of court aforesaid examined, and believing the same regular and in compliance with law, became in good faith the purchaser of said property for a valuable consideration, and received deed therefor from Romig, dated as aforesaid, and duly recorded March 10, 1897, and he at once entered into possession (*R., 67, 68, 90, 91*).

At the time of his said purchase the property consisted of unimproved prairie land. Thereupon he erected three residences thereon, as well as made various permanent and valuable improvements, paid the taxes, etc., all at large expense, and has since resided thereon (*R., 90, 91*).

Some *fourteen* months thereafter, and on May 11, 1898, Myrtle Gillett filed motion in the case to set aside the judgment which had been so theretofore entered against her, alleging as grounds therefor that the attempted service by publication was irregular and void; that the affidavit upon which the same was based was insufficient in law, and that during all the times mentioned she had been in fact a resident of said Territory (*R., 51, 52*).

On September 17, 1898, notice of said motion was given to and acknowledged by the respective solicitors of Romig and Harding (*R., 53*). Thereafter Romig and Harding filed affidavits, etc., in opposition to the motion aforesaid (*R., 59–62*).

On April 12, 1899, by leave of the court, Harding filed a separate motion to strike said motion of Gillett from the files, it being recited therein that he appeared specially and for the purposes of said motion only. In said motion and ac-

companying affidavit he set forth his title to the property as a *bona fide* purchaser, for a valuable consideration, without notice, etc., and he protested against the jurisdiction of the court to set aside his title to the property in the summary manner invoked by Gillett in her motion (*R., 64, 65*).

Harding filed further affidavit June 24, 1899, setting forth that at the time of his purchase the property was unimproved prairie land; that he had built three residences thereon, as well as made various permanent and valuable improvements; that he had resided on the property for several years; that there was no fraud or collusion between himself and Romig in obtaining the judgment in foreclosure; that in purchasing the land and parting with the consideration and in making said improvements thereon he relied upon said orders and decrees of the court, believing the same regular and in full compliance with law, etc. (*R., 90, 91*).

All motions of Romig and Harding were by said trial court overruled, not because the said defense of *bona fide* purchaser for value, without notice, etc., was not in fact true, but upon the ground, as stated by the court, that the judgment in foreclosure was void, and that therefore all subsequent proceedings thereunder were likewise null and void and of no effect in law. Accordingly decree was entered April 15, 1899, vacating said judgment in foreclosure and all subsequent proceedings thereunder, the question of right of possession being reserved (*R., 74*).

On June 1, 1899, a further decree was entered directing both Romig and Harding, as his grantee, to forthwith quit and surrender the full and complete possession of the property to Gillett, and, in the event of their failure so to do within fifteen days, that the sheriff remove said Romig and Harding from the property, and put the said Gillett into the possession thereof (*R., 81*).

Motions for new trial having been made and overruled, both Romig and Harding prosecuted appeals to the supreme court of the Territory of Oklahoma from the decrees afore-

said, and on June 30, 1900, that court *affirmed* said action of the trial court (*R., 101*).

Within sixty days thereafter, and on, to wit, September 29, 1900, an appeal from said decree was duly allowed, from said final decree, and *supersedeas* bond approved October 2, 1900, and filed October 3, 1900, being *within* said period of sixty days. (*See* Danville *vs.* Brown, *128 U. S., 503.*)

The order allowing said appeal gave appellants the period of sixty days in which to perfect the same, thus *enlarging* the usual period of thirty to sixty days, as authorized by law and the practice of this court. (*See* rule 9 of this court, par. 1.) This fact appears in certificate of the clerk of said supreme court of said Territory, on file herein (*R., 112*), as follows:

"On the 29th day of September, 1900, an appeal was allowed by the supreme court of said Territory to the Supreme Court of the United States, for the review of judgment and order of the supreme court of said Territory, heretofore referred to, signed by Hon. John H. Burford, associate justice of the supreme court of Oklahoma Territory, and issued out of the clerk's office of the supreme court of said Territory, *giving the appellants 60 days in which to perfect their appeal* from the judgment of the supreme court of said Territory."

Within said period of sixty days, so expressly allowed by order of court, as last aforesaid, and on, to wit, November 26, 1900, the record in said case was lodged in the clerk's office of this court. (*See* files of this court, same title as herein, case No. 483, October term, 1900.)

Prior thereto, however, and on November 14, 1900, *before* said period of sixty days had in fact expired, the appellee, Myrtle Gillett, had said case docketed and dismissed, upon motion in that behalf, upon the production of a certificate of the clerk of the supreme court of said Territory, wherein was recited only the date of the final decree so appealed from and the date of the allowance of said appeal, omitting therefrom all reference to the very material fact that the time

for perfecting said appeal had been *enlarged*, as above stated. (*See* files in case No. 483, *supra*.)

In accordance with the usual practice in such cases, said motion to docket and dismiss was entirely *ex parte*, without any notice whatever to appellants, or opportunity afforded them to show the same to be premature (because of the order enlarging the time for perfecting the appeal, as aforesaid), and so the motion was granted, as a matter of course, November 14, 1900 (rule 9, par. 1, *supra*), although, in the light of the facts above stated, the same was, we submit, improvidently granted by the court.

It thus happened that when appellants lodged the record in said appeal in the clerk's office of this court, on November 26, 1900, and being within the period so expressly allowed them, they learned that the case had already been docketed and dismissed.

While under the practice of this court appellants might have asked this court to set aside and vacate the order of dismissal aforesaid, and for leave to docket the case and file record therein, because of the facts aforesaid (rule 9, par. 1, *supra*), yet appellants exercised their right and privilege of praying a second appeal in said case, with *supersedeas*, which they did accordingly, and the same was duly allowed January 22, 1901, by a justice of the supreme court of said Territory, and on January 24, 1901, a *supersedeas* bond therein was by said justice duly approved and accepted and thereupon filed, and order entered by said justice directing that all proceedings under said decree, both in said appellate and trial courts, be stayed pending this appeal.

Because of the fact, hereinbefore referred to, that the appellee has failed to print such parts of the record as are essential and necessary to the proper consideration and determination of the motions herein, as required by the practice of this court, it has been necessary for counsel to state to the court the above facts, which have been taken from the manuscript record on file in this case, as well as

from the files of this court in said case, No. 483, *supra*, to the end that the court, having before it the real record facts in the case, may be in a position to act advisedly in respect of the motions aforesaid.

## BRIEF.

### I.

THE VALUE OF THE PROPERTY HERE IN CONTROVERSY EXCEEDS $5,000, AND THIS COURT HAS JURISDICTION OF THE PRESENT APPEAL.

Counsel for appellee, in support of the motion to dismiss, assert that the jurisdictional amount is not involved in this appeal, and that "the extracts from the record printed herein show that the amount in controversy is less than $1,000," and that "the only thing involved in this suit is the judgment setting aside the decree of foreclosure for $700 and interest" (*Appellee's Brief, 1, 2, and 4*).

Appellee further adds:

"If appellants rely, in support of their right of appeal to this court, upon a greater value than is indicated in the record, they should have shown affirmatively by affidavits what that value was" (*Appellee's Brief, 4*).

It may perhaps be true that the very brief extracts printed by appellee from the record herein do not disclose the real value of the property in controversy, but, as above stated, the appellee has been pleased to select from a record which discloses fully and completely, not only the value of the property in controversy, but the real merits of the controversy as well and the rights of the appellants herein, only such parts thereof as seemingly support the grounds assigned for the motion to dismiss. Such parts of the record so printed show

only the original decree of foreclosure (which was, as stated, on a promissory note for $700, together with certain interest thereon and costs), order confirming sale, made under said decree, to the appellant John Romig; motion to set aside said judgment, the two decrees granting said motion and directing the summary eviction from the property of both Romig and his grantee, Harding, and the two appeals thereafter taken to this court. (*See* appellee's printed extracts from record in support of motion to dismiss.)

It is thus seen that it would be manifestly unjust and improper to confine this court to the consideration only of the parts of the record so printed and just enumerated in ascertaining the value of the property here in controversy.

Counsel for appellants are at a loss to understand why counsel for appellee make the statement, appearing in said brief, that "*no affidavit has been put in the record*" ascertaining the fact of value, and also the further statement that if appellants, in support of their right of appeal, rely "*upon a greater value than is indicated in the record, they should have shown affirmatively by affidavits what that value was.*"

We assume that such statement by appellee is the result of inadvertence, since the fact of value of the property in controversy is expressly ascertained, determined, and asserted in the affidavits of three witnesses, to the effect that said property is reasonably worth the sum of $5,500, exclusive of costs. These affidavits appear at the very beginning of the record, where they can hardly be overlooked. (Affidavits of William N. Permont, Julius Grieser, and August Massall (*R., 3 and 4*).

We therefore earnestly ask that the court refer to said affidavits so in the record, should it have any doubt upon the question of the real value of the property here in controversy.

Not only has such *affirmative* showing of value been made by the appellants and set forth in the record, but that showing remains and is absolutely uncontradicted by any show-

ing whatever to the contrary; and this, in effect, is conceded by the appellee, except only as said brief of counsel for appellee undertakes to assert to the contrary, although, as just shown, such assertion is not borne out by the record.

Appellee further insist that "the only thing involved in this suit is the judgment setting aside the decree of foreclosure for $700 and interest." Such contention is one which utterly ignores the rights and claims of Harding (appellant) as a *bona fide* purchaser for value of the property, without notice, and seeks to justify a decree directing his summary removal therefrom without affording him an opportunity to have his day in court.

Without here undertaking to repeat in detail what has been above stated, it is proper to remind the court that the appellant Harding, having caused examination to be made of the several orders, decrees, and proceedings had therein, and finding the same, so far as they appeared of record, to be regular in form and in supposed compliance with law, became the purchaser of the property from Romig for a valuable consideration, in perfect good faith and without notice.

The property at that time was unimproved prairie land, and upon his purchase Harding erected three residences thereon, made various permanent and valuable improvements, paid taxes, etc., and has resided thereon for several years.

All of these things he was permitted to do without question by any one, and it was not until *fourteen months thereafter*, and when he had so improved the property, as aforesaid, and had made large expenditures for that purpose, that the appellee, Myrtle Gillett, made appearance in court in the said foreclosure proceedings and moved to set aside in a summary manner the former decree in foreclosure and all proceedings therein and thereafter had, long after the expiration of the term at which said decree had been entered.

Such proceedings were had in respect of said motion that afterwards a decree was entered in said case, undertaking in said summary manner to vacate and set aside said decree in foreclosure, as well as all proceedings subsequently had thereunder, and directing that said Harding forthwith quit and surrender the possession of said property, and in default thereof that he be summarily evicted therefrom by the sheriff, which proceeding and action by the court, it is submitted, was irregular and beyond the power of the court.

Under this state of facts, it is impossible, as we respectfully submit, to assert that the only thing here in controversy is a decree of foreclosure of a $700 note and interest.

On the contrary, the real matter here in controversy is a decree which undertakes, in said irregular manner and without authority, as above shown, to summarily evict from this property, which is worth the sum of $5,500, exclusive of costs, the appellant Harding, who claims title thereto as an innocent purchaser for a valuable consideration, without notice, and that, too, in a suit to which he was not a party, and without affording him any opportunity to defend his rights and title to the property or any opportunity to have his day in court in respect of the matters aforesaid.

It thus appears, not only that the property here in controversy in fact exceeds the jurisdictional sum, but that the court below undertook to summarily oust appellant Harding from the possession of the property, as well as to deprive him of his title thereto in respect of matters, so far as concerned the said Harding, as to which the said court was utterly without jurisdiction in said case.

For all of the foregoing reasons, it is respectfully submitted that said motion to dismiss this appeal should be *overruled.*

## II.

THE SUPERSEDEAS BOND HEREIN WAS PROPERLY APPROVED AND ACCEPTED.

As above shown, appellants duly prosecuted appeal from the final decree aforesaid, and effected *supersedeas* therein within the period of sixty days from the date of the decree appealed from, and, notwithstanding the time for effecting said appeal was enlarged by the justice allowing the same so as to extend said period from thirty to sixty days, said appeal was, without notice to appellants, docketed and dismissed before the expiration of said period of sixty days.

As above shown, said dismissal was premature and, we submit, improvidently granted by the court, its attention not having been called to the fact that the time for perfecting the appeal had been so enlarged.

In view of said situation and said appeal having been so docketed and dismissed without any consideration thereof on the merits, the appellants prayed a second appeal, with *supersedeas*, and the same was duly allowed on January 22, 1901, and *supersedeas* bond approved by the court and filed January 24, 1901, and *supersedeas* thus effected and order entered in the supreme court of the Territory staying all proceedings in said district and supreme courts pending this appeal.

It is submitted that, under these facts, the *supersedeas* so effected, as aforesaid, was proper and in conformity with law, and counsel feel that it is here proper to remind the court that, as above shown, appellants were deprived of their first appeal and *supersedeas* thereunder by an order which, it is respectfully submitted, was improvidently granted, and but for which the motion to quash *supersedeas* could not have arisen.

Counsel deem it proper to further suggest to the court that the decree of the supreme court of the Territory, as

well as of said district court, is so manifestly erroneous, in so far as it undertakes to summarily evict from the possession of the property in controversy the appellant Harding, who, so far as the record shows, is conceded to have been an innocent purchaser for value in good faith and without notice, and to deprive him of his title thereto, without having in any way afforded him, in any court, an opportunity to be heard in respect of said matters, as to make the granting of a *supersedeas* to prevent the carrying into effect of such unjust and erroneous decree, pending this appeal, a matter of equity and right, and to likewise make it most inequitable and unjust that such *supersedeas* should be disturbed pending the final determination by this court of this controversy on the merits.

That the result of the decree appealed from herein, so far as the same affects the appellant Harding, is as above stated, we invite the attention of the court to the opinion rendered by said supreme court, wherein it will be found that while a full discussion is there undertaken as to the validity or invalidity of the original decree in foreclosure and the conclusion reached by the court that said decree in foreclosure was in fact null and void, and that all subsequent proceedings thereunder were likewise irregular and void, yet the rights and equities of Harding were apparently not considered by the court, except in the result of the opinion, in confirming a decree which directed the summary eviction of Harding from the property (*R., 103–105*).

Should this court, however, be of opinion that because of the fact that at the time of the approval and acceptance of the supersedeas bond on the second appeal more than sixty days had elapsed from the entry of the decree so appealed from, the same should not have been accepted and approved by the court below, then counsel for appellants request this court to now and here permit such *supersedeas* to be effected, and to approve and accept a *supersedeas* bond in that behalf *nunc pro tunc*, and to that end and in such event counsel

tender herewith a *supersedeas* bond, duly executed, with sureties, together with a certificate of a justice of the supreme court of said Territory as to the sufficiency thereof.

## III.

THE MOTIONS TO QUASH SUPERSEDEAS AND TO DISMISS APPEAL SHOULD BE OVERRULED.

Counsel have been necessarily limited in the discussion of the merits of this case, since they could not, with propriety and in the absence of a printed record, undertake a full discussion thereof; but it is submitted that an examination of the record in this case will disclose that the equities of the case are so overwhelmingly in favor of the appellant Harding as to require that each of the motions herein be overruled, to the end that this case may be thoroughly and fully considered by the court upon the entire record, and that pending such consideration the *status* of all parties and of the property shall be preserved by *supersedeas*.

Respectfully submitted.

Jeremiah M. Wilson
*Attorney for Appellants.*

WASHINGTON, D. C., *May* 9, 1901.

No. 52.

By my Auditor

Time Set to Print

# Supreme Court of the United States.

OCTOBER TERM, 1902.

No. [illegible] 52

JOHN ROMIG and DANIEL W. HARDING,
APPELLANTS,

v.

MYRTLE GILLETT,

APPEAL FROM THE SUPREME COURT OF THE TERRITORY OF OKLAHOMA.

BRIEF ON BEHALF OF APPELLANTS.

A. A. Hoffman, Jr.
Counsel for Appellants.
Attorney for Appellants

# Supreme Court of the United States.

**OCTOBER TERM, 1901.**

*No. 263.*

JOHN ROMIG AND DANIEL W. HARDING,
APPELLANTS,

*vs.*

MYRTLE GILLETT.

APPEAL FROM THE SUPREME COURT OF THE TERRITORY OF OKLAHOMA.

## BRIEF ON BEHALF OF APPELLANTS.

FACTS.

1. On February 2, 1895, Don A. Gillett made and delivered to the appellant John Romig his certain promissory note for the sum of $700, interest and costs, and therein waived presentation for payment, notice and protest, and notice of non-payment, as well diligence in attempting to collect same (*R., 14*).

The payment of said note was secured by mortgage, bearing even date with said note (and duly recorded on the same

date), from said Gillett to Romig, upon certain real estate (described in the record), the same then being *unimproved* prairie land in Oklahoma Territory (*R., 11, 12, 13, 49*).

The mortgage contained the usual provision that upon any default in payment of principal or interest, &c., the mortgagee "shall be entitled to the possession of said mortgaged premises" (*R., 13*).

2. It seems that thereafter, February 6, 1895 (as subsequently appeared in this case), Gillett sold and conveyed said real estate to Myrtle A. Gillett, appellee herein (*R., 52*).

3. Thereafter, March 11, 1896, default in payment having occurred and the conditions of the mortgage having been thus broken, suit in foreclosure was instituted by the mortgagee Romig against Don A. and Myrtle Gillett, it being therein alleged, *inter alia*, that said Myrtle Gillett had or claimed some junior interest or lien upon said real estate, and it was prayed that said mortgage be foreclosed and the real estate sold, and that all interest, estate, and equity of redemption, if any, of said defendants be forever barred and foreclosed (*R, 10–12*).

4. Summons duly issued under said petition in foreclosure March 12, 1896 (*R., 14*), and was thereafter duly returned *non est* as to each defendant (*R., 15*). Thereupon an affidavit was filed in pursuance of the statute in that behalf for the purpose of proceeding against said defendants by *publication* (*R., 15, 16*), and which notice was given, published, and proof thereof filed, as required by law (*R., 17, 18*).

5. Thereafter, on December 18, 1896, judgment in foreclosure was entered against said defendants and sale of said real estate ordered, in the event of failure to pay the amount of the indebtedness and costs, as therein adjudged and decreed (*R., 18–20*). Order of sale thereunder issued January

20, 1897, said real estate was duly appraised, notice of said sale was given and published and proof thereof filed, as required by law, and the real estate was sold to said Romig, he being the highest bidder, and return thereof was duly made to the court (*R., 20–24*).

The sale was thereafter *confirmed* by the court March 1, 1897, and an order issued directing the sheriff to make conveyance unto Romig and to put him into possession of the property (*R., 26*), which conveyance was made accordingly and Romig put into possession March 9, 1897 (*R., 27–29*).

It is thus seen that, so far as disclosed by the records of the court in which said proceedings were had, the title to and possession of the property in controversy became vested in Romig March 9, 1897.

6. On that date Daniel W. Harding (party appellant herein), having first had the several orders and decrees of court aforesaid examined by an attorney employed by him in that behalf, and being by him informed and believing that the same were regular and in compliance with law, became in good faith the purchaser of said property for a valuable consideration (*R., 49*), received deed therefor from Romig, dated as aforesaid and recorded March 10, 1897 (*R., 37, 38*), and he thereupon entered into possession of the property (*R., 49*).

At the time of his said purchase the property consisted of unimproved prairie lands. Thereafter he erected three residences thereon, as well made various permanent and valuable improvements thereon, of the value of $2,000, paid taxes upon the property to the amount of $200, and has ever since resided thereon (*R., 46, 49*), the property being now reasonably worth the sum of $5,500 (*R., 2, 3*).

7. Some *fourteen months thereafter*, and on May 11, 1898, the appellee Gillett filed motion to vacate and set aside

said judgment in foreclosure, as well all the proceedings had thereunder, alleging in support of the motion that the attempted service by publication was irregular and void; that the affidavit upon which the same was based was insufficient in law, and that during all the times mentioned she had been, in fact, a resident of said Territory (*R.*, *29*, *30*).

In support of said motion, appellee filed her own affidavit, confining the same, however, to the single question of *her* presence and residence in the Territory, not offering any answer or defense whatever to the merits of said foreclosure suit or making any tender to pay the mortgage indebtedness (*R.*, *31*), and also filed in support of said motion the affidavit of one Guy R. Gillett, stating that of his own knowledge the said Don A. Gillett was a *non-resident* of said county and Territory from the time of the institution of the suit until after March 1, 1897 (*R.*, *31*, *32*).

8. The single issue of presence and residence thus raised was heard and determined by the court upon affidavits, and on April 15, 1899, decree was entered setting aside and vacating said judgment in foreclosure and all proceedings had thereunder, but reserving the question of the right of possession and restitution (*R.*, *40*, *41*).

On June 21, 1899, the matter came on for further and final consideration, and it was thereupon decreed that said Romig and said Harding, as his grantee, *forthwith* quit and surrender the full possession of the property to said Gillett, and in the event of their failure that the sheriff remove them therefrom and put the said Gillett in possession (*R.*, *44*, *45*).

9. On June 30, 1900, said decree was *affirmed* by the supreme court of the Territory (*R.*, *53*, *54*).

10. Thereupon the case was brought to this court on appeal, with *supersedeas* (*R.*, *62*).

The foregoing statement indicates substantially the *facts* in the case, as well also the proceedings had therein. Without here repeating the same, the attention of the court is particularly asked to the following pleadings and proceedings, which are deemed to have an important and controlling bearing upon the questions raised by this appeal:

1. The affidavit of plaintiff's attorney, and upon which publication was made, contained a full statement of the filing of suit, of the cause of action, and relief therein sought; also a statement that summons in said cause had issued for said defendants and had been returned "not to be found," etc.; that the action was brought for the sale of said real estate under said mortgage, and added:

(*a*.) "Affiant further says that he is unable and that the plaintiff is unable, by using due diligence, to obtain service of summons on the said defendants within the Territory of Oklahoma."

* * * * * *

(*b*.) "Affiant further states, upon information and belief, that the said defendants * * * * are non-residents of the Territory of Oklahoma, and that service of summons cannot be made on the said defendants * * * within the said Territory," etc., (*R., 15, 16*).

(NOTE.—The attack made by appellee Gillett, and sustained by the lower courts, seems to be based solely upon the alleged insufficiency, under the laws of Oklahoma, of the foregoing affidavit for publication in respect of the paragraph thereof above designated as (*b*). It seems to be conceded that all proceedings thereafter had were *otherwise* regular and in compliance with law.)

2. After the proceedings had in said cause, resulting in a sale of said property, hereinbefore referred to, said sale was,

by the court, *confirmed*, the order of confirmation reciting, *inter alia*, the following:

"And the court having carefully examined the proceedings of said sheriff in making said sale, being satisfied that said sale has been made in all respects in conformity to law and the statutes in such cases made and provided. It is ordered and adjudged by the court that said sale and the proceedings be, and the same are hereby, in all respects, confirmed; and the clerk of said court is hereby directed to make an entry on the journal that the court is satisfied with the legality of such sale; and the said sheriff is ordered to execute to said John Romig, the said purchaser at said sale, a good and sufficient deed for said lands and tenements, so sold, to wit," etc. (*R.*, *26*).

3. As hereinabove stated, the *motion* of appellee Gillett to set aside and vacate said judgment in foreclosure and all proceedings had thereunder was based solely upon an allegation of the insufficiency in law of the affidavit of publication; it made no allegation or tender of any defense to the merits of the action, nor any tender to pay the mortgage indebtedness (*R.*, *29–32*).

4. The motion and accompanying affidavits of appellee were met and replied to by the affidavits of appellants (*R.*, *32*, *35*, *49*), and in various forms appellants objected and protested against the relief sought by appellee, as well the attempted ouster of appellants in summary manner and without due process of law, but without avail (*R.*, *33–38*, *41–43*, *45–50*, *59–62*).

5. As will be hereinafter shown, both the trial court and the supreme court of the Territory decided this case solely upon the alleged insufficiency of the affidavit of publication, and entirely ignored the rights of the appellant Harding as a *bona fide* purchaser for value under the proceedings in foreclosure and sale made thereunder (*R.*, *40*, *41*, *43–45*, *51*, *53*, *54*, *61*, *62*), as well also ignored the express provisions of

the statute laws of Oklahoma in that behalf made and provided (*infra*).

STATUTES OF OKLAHOMA.

Before passing to the consideration of the questions here involved, the statutes of Oklahoma, so far as here applicable according to the contentions of either side herein, may be usefully referred to.

(The references below given are to sections of chapter 66 of the code, set forth in the Statutes of Oklahoma, 1893:)

§ *10* (3884) abolishes the distinction between actions at law and in equity, and designates all as civil actions.

§ *46* (3920):

"Actions for the following causes must be brought in the county in which the subject of the action is situated, except as provided in section forty-seven:

* * * * * * *

"*Third.* For the sale of real property under a mortgage, lien, or other incumbrance or charge."

§ *47* (3921) provides for the venue of such actions where the real property involved is situate in two or more counties, etc. (not material in this case).

§ *72* (3950):

"Service may be made by publication in either of the following cases: In actions brought under the 46th and 47th sections of this code where any or all the defendants reside out of the Territory, or where the plaintiff with due diligence is unable to make service of summons upon such defendant or defendants within the Territory; in actions brought to establish or set aside a will, where any or all of the defendants reside out of the Territory; in actions to obtain a divorce where the defendant resides out of the Territory; in actions brought against a non-resident of the Territory, or a foreign corporation, having in this Territory

property or debts owing them, sought to be taken by any of the provisional remedies, or to be appropriated in any way; in actions which relate to, or the subject of which is, real or personal property in this Territory, where any defendant has or claims a lien or interest, actual or contingent, therein, or the relief demanded consists wholly or partly in excluding him from any interest therein, and such defendant is a non-resident of the Territory or a foreign corporation; and in all actions where the defendant, being a resident of this Territory, has departed therefrom, or from the county of his residence, with intent to delay or defraud his creditors, or to avoid the service of a summons, or keep himself concealed therein with the like intent."

§ *73* (3951):

"Before service can be made by publication, an affidavit must be filed stating that the plaintiff, with due diligence, is unable to make service of the summons upon the defendant or defendants to be served by publication, and showing that the case is one of those mentioned in the preceding section. When such affidavit is filed, the *party* may proceed to make service by publication."

§ *74* (3952) provides, in detail, how the publication shall be made, and what it shall contain.

§ *75* (3953):

"Service by publication shall be deemed complete when it shall have been made in the manner and for the time prescribed in the preceding section; and such service shall be proved by the affidavit of the printer."

§ *77* (3955):

"A party against whom a judgment or order has been rendered without other service than by publication in a newspaper, may, at any time within three years after the date of the judgment or order, have the same opened, and be let in to defend. Before the judgment or order shall be opened, the applicant shall give notice to the adverse party of his intention to make such an application, and shall file a full answer to the

petition, pay all costs, if the court require them to be paid, and make it appear to the satisfaction of the court, by affidavit, that during the pendency of the action he had no actual notice thereof in time to appear in court and make his defense; but the title to any property, the subject of the judgment or order sought to be opened, which, by it, or in consequence of it, shall have passed to a purchaser in good faith, shall not be affected by any proceedings under this section."

§ *482* (4360):

"If any judgment or judgments, in satisfaction of which any lands or tenements are sold, shall at any time thereafter be reversed, such reversal shall not defeat or affect the title of the purchaser or purchasers; but, in such cases, restitution shall be made, by the judgment creditors, of the money, for which such lands or tenements were sold, with lawful interest from the day of sale."

§ *586* (4464) states the different causes for which judgments or orders may be vacated.

§ *587* (4465) states that the proceedings to vacate shall be by motion, upon notice, etc.

§ *590* (4468):

"A judgment shall not be vacated on motion or petition, until it is adjudged that there is a valid defense to the action on which the judgment is rendered; or, if the plaintiff seeks its vacation, that there is a valid cause of action; and where a judgment is modified, all liens and securities obtained under it shall be preserved to the modified judgment."

§ *593* (4471):

"Proceedings to vacate or modify a judgment or order, for the causes mentioned in subdivisions four, five, and seven, of section five hundred and eighty-six, must be commenced within two years after the judgment was rendered or order made, unless the party entitled thereto be an infant, or person of unsound mind, and then within two years after the removal of such disability. Proceedings for

the causes mentioned in subdivisions three and six, of the same section, shall be within three years, and in subdivision nine, within one year after the defendant has notice of the judgment. A void judgment may be vacated at any time, on motion of a party, or any person affected thereby."

§ *620* (4498):

"In all cases, any occupying claimant being in quiet possession of any lands or tenements for which such person can show a plain and connected title in law or in equity * * * or being in quiet possession of and holding the same by deed * * * from and under any person claiming title, as aforesaid, * * * or being in quiet possession of and holding the same under sale on execution or order of sale against any person claiming title, as aforesaid, * * * or any person in quiet possession of any land claiming title thereto, and holding the same under sale and conveyance made * * * in pursuance of any order of court or decree in chancery where lands are or have been directed to be sold, and the purchasers thereof have obtained title to and possession of the same without any fraud or collusion on his or their part, shall not be evicted or thrown out of possession by any person or persons who shall set up and prove an adverse and better title to said lands, until said occupying claimant, his heir or their heirs, shall be paid the full value of all lasting and valuable improvements made on said lands by such occupying claimant, or by the person or persons under whom he, she or they may hold the same previous to receiving actual notice by the commencement of suit of such adverse claim by which eviction may be effected."

§§ *622* (4500) to *631* (4509), inclusive, provide, in detail, the procedure to be followed in the cases embraced in said § *620*, which procedure includes the impanelling of a jury to assess the amount of purchase-money, value of lasting improvements, value of the use, rents and profits, injury, etc.; and, further, that such occupying claimant shall not be dispossessed until he receive from such adverse claimant such amount, if any, as may be found in his favor under the inquiry and assessment herein referred to.

ASSIGNMENT OF ERRORS.

The *errors* alleged and relied upon are set forth at length in the printed record (*R.*, *5*, *6*,) and will not therefore be here restated. The same involve substantially a consideration of the action of the lower court in respect of—

(*a.*) The sufficiency in law of the affidavit for publication.

(*b.*) The vacating and setting aside of the judgment in foreclosure, and all proceedings had thereunder upon the filing of a mere motion, unaccompanied by the assertion of any defense to the merits of the action or any tender of the mortgage indebtedness.

(*c.*) The setting aside and vacating the title of appellant Harding, notwithstanding the express statutory provision that a title acquired by a purchaser in good faith, under or in consequence of a judgment thereafter vacated or opened, shall not thereby be defeated or affected; and

(*d.*) The attempted ouster, without due process of law, of a *bona fide* purchaser, for value, under and in consequence of said judgment and sale in foreclosure, without reimbursement for purchase-money or for amounts expended by him in good faith and without notice for improvements upon the property.

These questions will be considered in the order stated.

## I.

THE AFFIDAVIT FOR PUBLICATION WAS SUFFICIENT AND COMPLIED WITH THE REQUIREMENTS OF THE STATUTES OF OKLAHOMA.

As above shown, the statutes of Oklahoma (§ *72*, *supra*), so far as the present case is concerned, it being an action for the sale of real property under a mortgage (§ *46*, subdivision third, *supra*), provide, *inter alia*, for *two* grounds, upon either

one of which, affidavit having been filed, service by publication may be made:

(*a.*) "Where any or all of the defendants reside out of the Territory."

(*b.*) "*Or*, where the plaintiff *with due diligence* is unable to make service of summons upon such defendant or defendants within the Territory."

Either one of said two grounds was sufficient. Plaintiff's affidavit was in literal compliance with the above ground (*b*) and stated:

"Affiant further says that he is unable and that the plaintiff is unable *by using due diligence* to obtain service of summons on the said defendants within the Territory of Oklahoma" (*R., 16*).

The form of statement of this ground in the affidavit seems to be unobjectionable, and is apparently not attacked. The objection raised is that plaintiff instead of resting the affidavit upon the one ground added a second, as follows:

"Affiant further states *upon information and belief* that the said defendants * * * are non-residents of the Territory of Oklahoma, and that service of summons cannot be made on the said defendants, * * * within the said Territory," etc. (*R., 16*).

The statement of said second ground, *upon information and belief*, is objected to, and by the lower courts held *insufficient* in law (*R., 58*).

*General Requirements in Respect of Affidavits for Publication.*

Before considering specifically the affidavit under review in this case, a few principles having general application to affidavits for publication may be usefully referred to.

It is frequently stated, both in decisions and text-books, that, service by publication being purely statutory, the statu-

tory requirements must be complied with. While this is true, yet where there has been a substantial compliance with the statute, particularly in cases of foreclosure of mortgages and sales made thereunder to innocent purchasers, the court will not and should not thereafter set aside and annul the proceedings had thereunder upon an unnecessarily strict construction of either the statute or affidavit. Raymond v. Ries 49 Pac 1111

For example, an order, otherwise valid, will not be vitiated because of surplusage (Cruzen *vs.* Stephens, *123 Mo., 337;* Burnes *vs.* Burnes, *61 Mo. App., 612*), nor for immaterial defects and omissions (Webster *vs.* Daniel, *47 Ark., 131;* College *vs.* Pickens, *42 S. Cor., 511;* Foster *vs.* Givens, *67 F. R., 684;* Williams *vs.* Hudson, *93 Mo., 524;* Hansford *vs.* Hansford, *34 Mo. App., 262;* *In re* James, *99 Cal., 374*).

In the majority of cases wherein judgments obtained under service by publication were subsequently set aside the record disclosed either that the affidavit was *wholly* bad or that there was a fatal omission of some *material* requirement of the statute either as to the affidavit or the publication (*e. g.*, Hafern *vs.* Davis, *10 Wis., 443;* Beach *vs.* Beach, *43 N. W., 701;* Shields *vs.* Miller, *9 Kas., 266;* Harris *vs.* Claflin, *36 id., 543;* Grouch *vs.* Martin, *47 id., 313;* Brisbane *vs.* Peabody, *3 How. Pr., 109;* Hallett *vs.* Righters, *13 id., 43*).

It is important to bear in mind that probably a majority of the reported cases in which judgments obtained under service by publication have been subsequently set aside, either as voidable or void, because of an insufficient affidavit, involve two classes of cases: one, actions of *divorce*, where, for reasons of public policy and the welfare of society, the greatest strictness is required; and, the other, where *fraud* is alleged. This will account for the apparent lack of harmony in the decisions, and a reading of the decisions will also indicate that they are controlled largely by the merits involved in the particular case. So that, at last, each case turns upon its own facts, rather than upon any uniform rule of decision.

Again, service by publication being purely statutory, the decisions are necessarily based upon the statutes of the particular State in which the case arises; and as those statutes differ in many essential and material particulars, decisions, apparently in conflict, may in many instances be reconciled by referring to the particular statute involved.

Thus, in some of the States, upon the filing of an affidavit containing a statement of the *ultimate* facts, in the language of the statute, the publication notice issues by the clerk of the court; in others, the sufficiency of the affidavit having been first passed upon by the court, the latter itself issues the order and publication notice.

This difference in statutory procedure has given rise to a difference in the decisions, it being held that where the *clerk* of the court is the officer to receive the affidavit and issue the notice of publication—his duty not being judicial—*probative* facts need *not* be recited, and that it is sufficient if the affidavit set forth the *ultimate* facts; but where the *court* itself is required to pass the order of publication the affidavit for publication should contain a recital of the *probative* facts by which the ultimate facts are established, so that the court may pass upon the sufficiency thereof.

This distinction is clearly stated in the opinion of the court in Ervin *vs.* Milne (*43 Pac., 706*), where, under a statute of Montana, the notice of publication was issued, not by the court, but by the *clerk*. The court, in considering an affidavit reciting merely the *ultimate* facts (as to due diligence, etc.), held it to be sufficient:

> "If it set forth substantially, in the language of the statute, enough of the ultimate facts recited in the statute as reasons for the publication of the summons."

The opinion there points out the reason for the different rule of decision followed in the earlier cases in that State (Alderson *vs.* Marshall, *7 Mont., 288;* Palmer *vs.* McMaster, *8 Mont., 186*), the same having been decided under an earlier

statute which required the order of publication to be issued by the *court* (in force prior to 1887).

From an examination of the authorities it will be found that it has been repeatedly held that in affidavits for publication the *affirmative* statement of the ground upon which it is based is sufficient, and it is not necessary, for example, in stating that *due diligence* has been used, to state the facts and circumstances establishing the *kind of diligence* used (Bank *vs.* Eldred, *20 Wis., 207;* Young *vs.* Schenk, *22 id., 530;* Sueterlee *vs.* Sir, 25 *id.*, 357; Ervin *vs.* Milne, *43 Pac., 706;* Van Wyke *vs.* Hardy, *20 How. Pr., 222, etc.*).

And in Washburn *vs.* Buchanan (*34 Pac., 1049*, Kansas, 1893) the court sustained an affidavit containing the recital that "defendants were non-residents of this State, and service could not be had upon them within the State," even though the same omitted to add the words "due diligence," which were required by the statute then in force (Statutes of Kansas, 1889). Under the earlier statutes (1868) the clause relating to "due diligence" did not appear.

*The Affidavit for Publication in the Present Case.*

Having thus briefly alluded to a few of the principles having general application to affidavits for publication, attention is now asked to the particular affidavit here under review.

*1.* The *first* ground alleged in the affidavit (*b, supra*), namely:

"Affiant says that he is unable and that the plaintiff is unable by *using due diligence* to obtain service of summons on the said defendants within the Territory of Oklahoma" (*R., 16*)—

was and is in exact, strict, and literal compliance with the requirements of the statute (§§ *72* and *73*, and ground *b*, *supra*).

This averment, it will be observed, is positive and in the affirmative, and is therefore not subject to the criticism

made in respect of the further and other ground for publication contained in the affidavit, and which will be presently referred to.

The affidavit in this case was made by plaintiff's attorney, which, under said §§ *72* and *73* (*supra*), was in compliance with law (Banta *vs.* Wood, *32 Ia., 469;* Palmer *vs.* McCormick, *30 F. R., 82;* Bird *vs.* Mfg. Co., *45 id., 458;* Bank *vs.* Eldred, *20 Wis., 207*, and Storm *vs.* Adams, *56 id., 137*).

As has been above shown, under the laws of Oklahoma an affidavit for publication may be filed in the cases and of the character above referred to, and thereupon the *party* may proceed to make service by publication in the manner pointed out in the statute (§§ *72*, *73*, *74*, and *75*, *supra*).

In other words, the *party* having brought himself within the provisions of the statute, the publication notice issues by the clerk of court, and an order of publication by the court is *not* required (§ *73*, *supra;* also *R., 17*).

The authorities above cited establish that in such case *probative* facts need *not* be recited, and that it is sufficient if the affidavit set forth the *ultimate* facts.

That the present affidavit does set forth such *ultimate* facts in the exact language of the statute, in the affirmative and in positive terms of averment, in respect of the ground above referred to as (*b*), cannot be questioned.

Under the authorities, the proper statement in an affidavit of one statutory ground for publication is sufficient.

Thus, in Decorvet *vs.* Dolan (*35 Pac., 72*, Washington, 1893) the statute involved was one requiring the *clerk* to issue the notice of publication, and the affidavit there under consideration contained a recital that "defendants are non-residents," although it did not allege the use of due diligence. The court held said statement of fact to be sufficient, and held, further, that if *any* ground in the statute is alleged, it is sufficient, even though *all* of such grounds are not alleged.

Here one statutory ground was properly stated in the

affidavit, and was sufficient to support the service by publication (Decorvet *vs.* Dolan, *supra*), and the other ground therein stated, even if defective (which is not admitted), could have been rejected as unnecessary without vitiating the service (Sueterlee *vs.* Sir, *25 Wis., 357*).

It has been above pointed out that, under the statutes of Oklahoma, the *party*, having filed affidavit for publication, proceeds to make the publication, and the publication notice issues by the *clerk of the court*, and *not by the court* itself, and hence, under the authorities, the statement of the *ultimate* facts which bring the case within the requirements of the statute is sufficient, and that, therefore, the affidavit of publication in the present case, as to ground (*b*) thereof, *supra*, complied literally with the statute (§§ *72* and *73*, *supra*), and was sufficient, in law, to support the publication.

*2.* Passing now to the *second* ground alleged in the affidavit (*a*, *supra*), namely, "*upon information and belief*, that the said defendants * * * are non-residents of the Territory," etc. (*R., 16*).

This statement the court below characterized as a "mere hearsay declaration of counsel for the plaintiff," and it added that it "does not amount to legal proof" (*R., 58*).

In support of such holding, the court below cited but one case (*R., 58*), that of Hafern *vs.* Davis (*10 Wis., 443*), the facts in which, as well the character of the action there involved, were entirely different from the case here under review; and, moreover, the decision in that case was not based upon such holding, nor was any such supposed holding therein followed by the Wisconsin court in later decisions, as will below be shown.

In most jurisdictions it is held that the mere fact that some of the averments of an affidavit for publication are

made *on information and belief* will *not* render the affidavit insufficient.

Malaer *vs.* Damron (*31 Ill. App., 572*).
Dietrich *vs.* Lang (*11 Kan., 637*).
Colton *vs.* Ruppert (*60 Mich., 318*).
Walter *vs.* Degraaf (*19 Abb. N. Cas., 406*).
Chase *vs.* Lawson (*36 Hun., 221*).
Van Wyke *vs.* Hardy (*11 Abb. Pr., 473*).

In the last case (Van Wyke *vs.* Hardy) the affiant stated that after due and diligent search and inquiry the defendants could not be found in the State of New York, "*as he is informed and verily believes.*" This was held sufficient.

As above stated, the court below in the case at bar based its decision, so far as this branch of the case is concerned, upon the supposed authority of Hafern *vs.* Davis (*10 Wis., 443*).

That case was an action for damages for breach of promise of marriage. Under the Code of Wisconsin then in force (§ 40), the order for publication was required to be made by the court or a judge thereof. An affidavit for publication had been filed, publication made, and thereafter judgment by default entered, and damages assessed against the defendant. In reviewing said judgment, the court stated:

"This affidavit does not state a case falling within either subdivision of section 40 of the code. It is so totally defective that it is difficult to say under which subdivision the pleader intended to proceed."

The court then pointed out various fatal omissions, and then added:

"The affidavit is in other respects irregular. Most of the statements are upon information and belief. Such statements are but hearsay, and not evidence of fact * * * We do not wish to be understood as deciding that in no case can such statements be received."

It will be noted that even here the Wisconsin court was careful to limit and confine its criticism of statements made "upon information and belief" in affidavits for publication to the particular case there before it, expressly reserving to itself the right to hold otherwise in other cases.

It is thus seen that the judgment in that case was held void, not because of the alleged *irregularity* referred to in the last paragraph, just quoted, but because the affidavit stated *no* statutory ground for the publication.

This is made perfectly clear in the later case of Storm *vs.* Adams (*56 Wis., 137*). There the affidavit for publication and under review by the court had been made by plaintiff's attorney, and was "*upon information and belief.*" It was there urged that it was insufficient, and the case of Hafern *vs.* Davis (*supra*) was relied upon in support of the contention.

The court, however, sustained the affidavit, and in its opinion pointed out that the affidavit in the Hafern-Davis case stated *no* statutory ground for the publication, and that for that reason *alone* the judgment therein had been held void. It also observed that the opinion in said former case had further commented on the affidavit under review in that case as having been in *other* respects *irregular*, because made upon information; but as to this it states:

"But the judgment was not held void for this irregularity, but because the affidavit stated *no* statutory ground for the publication."

So, too, in the case of Bank *vs.* Eldred (*20 Wis., 207*), which was an action to foreclose a mortgage on real property, an affidavit had been filed by plaintiff's attorney wherein, after reciting the cause of action, relief sought, etc., it was stated:

"That said defendants cannot, after due diligence, be found in this State; that, as affiant is *informed and believes*, said defendants are not residents of this State," etc.

(That affidavit, it will be observed, is in language substantially similar to the one at bar, *R.*, *16*.)

There the court was asked to hold the affidavit insufficient under the authority, among others, of the Hafern-Davis case, *supra*, but the court declined to so hold, and sustained the sufficiency of the affidavit.

And, again, in the case of Young *vs.* Schenk (*22 Wis.*, *530*) the affidavit stated:

"That the defendant * * * is a non-resident of the State of Wisconsin, and cannot, after due diligence, be found therein."

The affidavit then added that affiant—

"is *informed and believes* that the said defendant * * * is a resident of the State of New York," etc.

That affidavit was likewise held sufficient.

Without further citation it is clear that the only authority relied upon by the lower court to sustain its holding in this regard—namely, the Hafern-Davis case—does not, in fact, sustain it, and, moreover, if it did that case was overruled in the later Wisconsin cases, just referred to.

It does not appear that there is any rule of decision in Oklahoma in respect of the sections of the statutes here under review.

*3.* In this connection it should be borne in mind that the defendant Don A. Gillett, the mortgagor, was, in fact, a *non-resident* of the Territory during all times from the institution of the suit until after the judgment and sale in foreclosure (*R.*, *31*, *32*), so that, as to the *mortgagor*, no question whatever can arise in this case.

From all of the foregoing, it is submitted that the affidavit for publication was *sufficient* and was in compliance with the requirements of law; that the judgment and sale in fore-

closure based thereon were regular and valid, and that the court below *erred* in holding the same irregular and void.

## II.

THE COURT ERRED IN VACATING AND SETTING ASIDE THE JUDGMENT IN FORECLOSURE AND ALL PROCEEDINGS HAD THEREUNDER UPON THE FILING OF A MERE MOTION, UNACCOMPANIED BY THE ASSERTION OF ANY DEFENSE TO THE MERITS OF THE ACTION, OR ANY TENDER OF THE MORTGAGE INDEBTEDNESS.

As above shown, the affidavit for publication in this case was *sufficient*, and therefore the court below was not warranted in setting aside and vacating the judgment in foreclosure and the proceedings had thereunder.

The statutes of Oklahoma, as above shown, contain various provisions in respect of vacating judgments.

For example, § *77* (3955) provides that a party proceeded against by publication may at any time within three years from the rendition of judgment have the same opened and be let in to defend. Before such judgment can be opened, however, the applicant is required to give notice, also to file a full answer to the petition, pay all costs, if required by the court, and, further, shall make it appear by affidavit that during the pendency of the action no actual notice thereof was had to appear in court and make defense.

§ *590* (4468) provides that a judgment shall *not* be vacated on motion or petition *until* it is adjudged that there is a valid defense to the action on which the judgment is rendered.

§ *593* (4471) fixes the periods within which the judgments therein enumerated may respectively be vacated. It concludes by providing that a *void* judgment may be vacated *at any time* on motion, etc. (*Note.*—So far as said § *593* may be claimed to confer jurisdiction to vacate a void judgment upon motion, it must be read in connection with said § *590*,

*supra*, which provides generally that a judgment shall *not* be vacated on motion until it is adjudged that there is a valid defense to the action in which the judgment was rendered.)

A mere reading of said sections (and which have been hereinbefore quoted in full), taken in connection with the facts in the present case, will show that the appellee failed utterly to bring herself within either or any of the provisions of law in respect of vacating the judgment in this case.

She did not tender or file a full, or any, answer to the petition in the case, nor did she allege, nor was it adjudged, that there was any defense, valid or otherwise, to the action on which the judgment was rendered; a mere *motion* was presented, asking that the judgment be vacated, in support of which two affidavits were filed, one alleging that at all times covered by the suit the defendant, Don A. Gillett, the mortgagor, was *absent* from the Territory (*R., 31, 32*), and the other, her own affidavit, stating that she was present within the Territory of Oklahoma during the time of the proceedings, was well known to a large number of persons in the county; that she had no knowledge of the institution or prosecution of the case "*until long after date of sale of land*," and that she had no actual notice of the institution and pendency of the action (*R., 31*).

It is a significant fact that appellee thus carefully avoided stating *when* she did acquire such knowledge or notice.

The fact remains, however, that it was not until some *fourteen months* after Harding had acquired title to the property, and during which time he had expended large sums of money in improving it and erecting buildings and a residence thereon, that she, for the first time, attacked the regularity of the proceedings under which he acquired title.

Notwithstanding the fact that the judgment was admittedly valid, regular, and binding against the defendant mortgagor (from whom appellee acquired title *subsequent and*

*subject* to the mortgage in suit), appellee seems to have proceeded upon the theory that she could ignore every statutory provision made for the protection of persons acquiring title to property under the sanctity of judicial proceedings, but which are thereafter attacked, and that she could base her claim solely upon the supposed authority of § *593* (4471), *supra*, which, as has been seen, is merely a *statute of limitations*.

That section, having fixed the various periods of limitation within which judgments of the several classes therein specifically enumerated may be vacated or modified, concludes by adding that a *void* judgment may be vacated *at any time* on motion, etc.; in other words, that the statutory limitations therein prescribed shall have no application to *void* judgments.

This exception would seem to necessarily follow, even without statutory expression. But to say that that clause (just referred to) operates to authorize such a motion as was filed in this case, unaccompanied by any answer, or the assertion of any defense, valid or otherwise, to the merits of the action, or by any tender of the mortgage indebtedness, would be to absolutely ignore and hold of no effect the several express statutory provisions hereinbefore quoted and which were made to cover and protect just such rights of *bona fide* purchasers as are here involved.

It would be hard to conceive of a case more completely within and covered by the statutory provisions aforesaid, as well, also, within the protection and security of title and property therein intended to be afforded, than is the present.

Assuming for the sake of argument that appellee, upon a proper showing and upon compliance by her with the express statutory requirements, could have had said judgment in foreclosure opened, without, however, thereby affecting or defeating the title of appellant, Harding, it is perfectly manifest that she utterly failed to follow the requirements of the

statutes, and that, therefore, she was not entitled to the relief sought.

It is a familiar rule of law and decision that an application to open a judgment obtained by default made under a statute must substantially comply with all of its provisions (Durham *vs.* Moore, *48 Kans., 135*).

That the motion of appellee to set aside the judgment in foreclosure, as well all proceedings had thereunder, did not in the slightest respect comply with any or either of the provisions of said statutes is so self-evident as to hardly justify counsel in attempting any further argument in respect thereof.

It is respectfully submitted that the court below further *erred* in its holding in this regard.

## III.

THE COURT ERRED IN VACATING THE TITLE OF APPELLANT HARDING, NOTWITHSTANDING THE EXPRESS STATUTORY PROVISIONS THAT THE TITLE OF A BONA FIDE PURCHASER, FOR VALUE, ACQUIRED UNDER OR IN CONSEQUENCE OF A JUDGMENT THEREAFTER OPENED OR VACATED, SHALL NOT THEREBY BE DEFEATED OR AFFECTED.

The court below by its decree undertook to summarily oust and dispossess appellants from possession of the property in controversy in utter disregard of the rights and claims of appellant Harding, who, as shown by the uncontradicted facts of record, was and is a *bona fide* purchaser for value under and by virtue of the foreclosure proceedings aforesaid, and upon the faith of which title he expended large sums of money.

As bearing upon the question of *good faith* and as showing the state of the judicial record upon which appellant Harding, at the time of his purchase, had a right to rely, the

attention of the court is particularly asked, *first*, to the judgment in foreclosure, wherein the court recited that:

"the said defendants, Don A. Gillett and Myrtle Gillett, come not, but make default, *although duly and legally served by publication*" (*R., 18*);

and, *second*, to the order and judgment of *confirmation* of sale, wherein it is recited:

"and the court having carefully examined the proceedings of said sheriff in making said sale, being satisfied that said sale has been made in all respects in conformity to law and the statutes in such cases made and provided * * * and the clerk of said court is hereby directed to make an entry on the journal that the court is satisfied with the legality of such sale" (*R., 26*).

The record also shows that, prior to his said purchase, appellant Harding employed an attorney to make examination as to the regularity of said foreclosure proceedings, and acting upon such report, and in the belief that said proceedings were in all respects regular and valid, he made purchase of the property, and for a period of about *fourteen months thereafter* continued in the quiet and peaceable possession thereof, exercising full and complete ownership, erecting buildings, residing thereon, etc., etc., without notice of any adverse claim made by or on behalf of any one whomsoever, until the filing of motion to set aside the judgment (*R., 35, 47–49*).

As above shown, § *77* (3955), which authorizes the opening of judgments obtained under service by publication, in the certain cases and under the conditions therein prescribed, expressly provides that such action *shall not affect* the title of a purchaser situate as is the appellant in this case.

In addition to that section, there is the further provision of § *482* (4460) which in express terms directs that if any judgment in satisfaction of which any lands or tenements are sold shall at any time thereafter be reversed, the reversal

*shall not defeat or affect the title of such purchaser*, and in such cases it is directed that restitution shall be made by the judgment creditors of the money, with interest, for which such lands or tenements were sold.

And, again, § *590* (4468) provides that, where a judgment is modified, all lands and securities obtained under it *shall be preserved* to the modified judgment.

The above quoted §§ *77* (3955), *482* (4460), and *590* (4468), if given the meaning properly attributable to the words used, expressly and in unmistakable terms *preserve* unimpaired to a *bona fide* purchaser, situated as is the appellant Harding in this case, the title, lien, and security which, *by or in consequence* of the judgment, passed to him, even where such judgment shall thereafter be opened, reversed, vacated, or modified.

If, therefore, said provisions of law have application to any case, they furnish protection to the appellant Harding in this case, whose position as a *bona fide* purchaser for value, under the supposed security afforded by judicial sale, is absolutely unassailed.

Thus in Howard *vs.* Entreken (*24 Kan., 428*) plaintiff had obtained title to the property under a judgment obtained upon service by publication; he thereafter sold the property to an innocent purchaser. The statute there involved was identical with § *77* (*supra*) of the Statutes of Oklahoma. The court there declined to permit the title of such innocent purchaser to be disturbed, and said:

"If the judgment is afterwards reversed, or opened up, the defendant who has lost his property must look to the plaintiff for redress.

* * * * * *

"If Entreken had purchased in good faith the property at a judicial sale, it must be conceded that his title would not have been divested by the reversal of the judgment. As he purchased the property upon the faith of a judicial

decree from the party plaintiff, for a valuable consideration, and in good faith, the like rule prevails."

See, also, Guiteau *vs.* Wisely (*47 Ill., 433*), and Taylor *vs.* Boyd (*3 Ohio, 338*).

The court below, as will be seen from its opinion (*R., 58, 59*), entirely ignored the rights and claims of appellant Harding, as a *bona fide* purchaser, and, having arrived at the erroneous conclusion that the judgment in foreclosure was void, disposed of Harding by the statement that every subsequent proceeding under the void judgment was equally void.

In support of that holding, the court below cited three cases decided in Kansas: Shields *vs.* Miller (*9 Kas., 390*), Harris *vs.* Claflin (*36 id., 543*), and Grouch *vs.* Martin (*47 id., 313*).

The cases of Shields *vs.* Miller and Harris *vs.* Claflin (*supra*) were actions in ejectment between the grantee of a mortgagor and a purchaser under foreclosure proceedings, and the court, having found that the affidavit for publication in the foreclosure proceedings and there under review was *wholly* bad because of a total omission to state the statutory prerequisites for publication, held that the judgment based thereon was void. It was not there claimed that the affidavit stated the statutory grounds defectively or insufficiently, but that it was *totally* bad in that it did not allege the statutory grounds.

In those two cases the court did apparently permit a recovery in said collateral action (ejectment), notwithstanding the fact that title was acquired by the purchasers under or in consequence of the sales in foreclosure, and notwithstanding the further fact that the judgments in foreclosure had never been directly attacked or set aside. Said two decisions are, however, in direct conflict with what seems to be the overwhelming weight of authority, as will presently be shown.

The other case so cited by the court below, Grouch *vs.* Martin (*supra*), is not here applicable. In that case judgment by default was obtained under service by publication, and, execution having issued thereunder and the lands of defendant levied upon, it was objected that the affidavit for publication was insufficient in entirely omitting a vital statutory requirement. The court sustained the objection, quashed the execution and levy, and reversed the judgment, but there the lands had not been sold, no rights of innocent purchasers had intervened, and the question was merely between the original parties to the action; hence that decision can have no useful bearing upon the determination of the present case.

To hold that the appellant Harding can be so summarily deprived of his money and property, without redress of any kind, is not only in direct conflict with the laws of Oklahoma, but is subversive of every legal and equitable consideration, even without the aid of statutory enactment.

This subject is treated of in Freeman on Judgments (*vol. 2, § 509*). The author there quotes at length from the case of Reeve *vs.* Kennedy (*43 Cal., 649*) as follows:

"No principle is better settled than that a purchaser at a judicial sale, without notice, under proceedings regular upon their face, and had in a court of competent jurisdiction, is not affected by any mere error of the court for which the judgment might be reversed upon appeal, nor for any secret vice in the judgment not appearing on the face of the record, and which can be made to appear only by the production of extrinsic evidence. He is bound at his peril to inquire whether it sufficiently appears on the face of the record that the court had jurisdiction to render the judgment, and whether there is a valid execution. But nothing more is required of him. * * * As between the parties to the action, a judgment fraudulently obtained will be set aside and held for naught when the fraud is made to appear. But there would be no security in titles acquired at judicial sales if the rights of a *bona fide* purchaser without notice could be overthrown by subsequent proof that the judgment was obtained by fraud, or that the

record, which showed a due service on the defendant, was in fact false. The repose of titles, and indeed every consideration of public policy, demand that a purchaser at a judicial sale without notice, under proceedings regular upon their face, and by a court of competent jurisdiction, should be protected as against mere errors of the court and against secret vices in the proceedings founded on fraud, accident, or mistake, and which can only be made to appear by the proof of extrinsic facts not appearing on the face of the record. No prudent person would purchase at a judicial sale if he incurred the hazard of losing his money in case it should be made to appear that the judgment was obtained by perjury or other fraudulent practices, or that the record on which he relied as proving a service on the defendant was in fact false."

Again, in the case of Hammond *vs.* Davenport *et al.* (*16 Ohio St., 177, 183*), collateral attack was made in respect of certain proceedings in foreclosure, wherein service had been made by publication; and plaintiffs, in said collateral suit, asserted that they were, in fact, residents of the State at the time of the foreclosure proceedings and could have been served. In that State the right is given to any defendant proceeded against by publication to come in within five years thereafter, have such decree opened, and be let in to defend, upon the condition, however, that title to any property which by or in consequence of such decree shall have passed to a *bona fide* purchaser shall not be thereby affected. (This saving proviso, it will be observed, is similar to the provision in the Oklahoma Statutes, § *77, supra.*) The court referred to that section of the Ohio statutes and declined to permit the validity of the title acquired by the purchaser at such judicial sale to be disturbed.

See also to the same effect:

Hahn *vs.* Kelly (*34 Cal., 391*).
Ogden *vs.* Walters (*12 Kan., 282*).
Callan *vs.* Ellison (*13 Ohio St., 446*).
Payne *vs.* Lott (*90 Mo., 676*).
Jones *vs.* Driskell (*94 id., 190*).
Schmidt *vs.* Niemeyer (*100 id., 207*).

Further citation of authority would seem unnecessary.

Again, it is to be kept in mind that by the terms of the mortgage involved in the present case the mortgagee became entitled to the *possession* of the property upon breach of condition (*R., 13*), and which breach admittedly occurred.

It is also conceded that appellee took her conveyance *subject* to the payment of said mortgage (*R., 52*), and that by the sale in foreclosure the mortgage indebtedness was satisfied to the extent of the proceeds realized from such sale.

And yet appellee claims the absolute right of possession of the property thus freed of the mortgage incumbrance, as well also the right to deprive the innocent purchaser of all amounts expended by him, in entire good faith, both in the purchase of the property and in maintaining and improving it.

It is believed that no such inequitable doctrine has ever prevailed in any jurisdiction, either at common law or under statutory authority.

This question was considered by this court in the case of Evans *vs.* Pike (*118 U. S., 241, 248, 249*). In that case, a person having an interest in mortgaged premises sold under foreclosure, but who had not been made a party to such foreclosure proceedings, sought by petitory action (in the nature of an action of ejectment at common law) to dispossess the purchaser of said premises under said judicial sale, but without redeeming or offering to redeem the property by paying the mortgage debt.

This the court declined to permit. In the opinion, the court quotes from the case of Dufour *vs.* Camfranc (*11 Martin, 607, 615*):

"Nothing could be more unjust than to permit a debtor to recover back his property, because the sale was irregular, and yet allow him to profit by that irregular sale to discharge his debts."

It also quotes with approval the same rule of decision from the following cases:

Donaldson *vs.* Rouzan (*8 Martin, N. S., 162*).
Stockton *vs.* Downey (*6 La. Ann., 581*).
Taylor *vs.* Huey (*11 id., 614*).

The opinion proceeds (*p. 248*):

"In the English system, followed in most of the States, a person having an interest in mortgaged premises sold under a foreclosure, and not made a party to the proceedings, merely retains his equity of redemption, that is, a right to redeem the property by paying the amount due on the mortgage. He cannot turn the purchaser out of possession, without redeeming, or offering to redeem, the property by paying the mortgage debt. This rule is founded in such manifest justice that we should be surprised not to find it in some form in a system of law drawn from the same source as that of English equity. An examination of the Louisiana decisions shows that we are not mistaken in our anticipations."

And, again, in the case of Brobst *vs.* Brock (*10 Wall., 519, 534*), wherein a mortgage had been foreclosed and sale made thereunder and which judgment in foreclosure was irregular because neither the original mortgagor nor his grantee had been served with process, either actually or constructively. Action of ejectment was subsequently brought, in which it was alleged that said judgment was irregular and void. This court, however, held:

"An irregular or a void judicial sale, made at the instance of a mortgagee passes to the purchaser all the rights the mortgagee, as such, had. For this authority is hardly needed" (citing Gilbert *vs.* Cooley, *Walker's Chy., 494*; Jackson *vs.* Bowen *et al., 7 Cowen, 13*).

The cases of Bryan *vs.* Kales, Bryan *vs.* Brasius, and Bryan *vs.* Pinney (*162 U. S., 411, 415, and 419*) were actions of ejectment in which the mortgagor sought to recover against the

mortgagee in possession or against persons holding under such mortgagee, the right to recover being asserted upon the ground of an irregular or void judgment in foreclosure and sale thereunder. This court, however, declined to permit a recovery, and held:

"A mortgagor of land cannot recover in ejectment against the mortgagee in possession, after breach of condition, or against persons holding under the mortgagee.

"An irregular judicial sale, made at the suit of a mortgagee, even though no bar to the equity of redemption, passes all the mortgagee's rights to the purchaser."

The present case obviously comes within the decisions above quoted. Here the mortgagee became entitled to the possession of the property upon breach of condition—condition was broken, the mortgage was foreclosed, and the property sold, and thus freed and discharged of said mortgage incumbrance. The appellee, occupying the position of subsequent grantee of the mortgagor and having acquired her title admittedly *subject* to the payment of the mortgage debt, comes into court and asks that she be restored to her ownership and possession of the property thus freed of said mortgage debt without the performance by her of any condition whatever, and she further asks that the innocent purchaser under the foreclosure proceedings shall be evicted as one having no rights or equities of any kind or character whatsoever.

It is submitted that the action of the court below in this regard was without authority of any kind, statutory or otherwise.

## IV.

THE ATTEMPTED OUSTER, WITHOUT DUE PROCESS OF LAW, OF A BONA FIDE PURCHASER, FOR VALUE, UNDER SAID FORECLOSURE PROCEEDINGS, WITHOUT REIMBURSEMENT OF PURCHASE-MONEY, OR OF AMOUNTS EXPENDED, IN GOOD FAITH AND WITHOUT NOTICE, FOR IMPROVEMENTS, IS CONTRARY TO THE EXPRESS PROVISIONS OF THE STATUTES OF OKLAHOMA.

It is proper to here observe that the application made by the appellee was not in the exercise of any right of redemption, and indeed could not have been, since the right to redeem property after sale in foreclosure of a mortgage, wherever it exists, is *statutory* (Parker *vs.* Dacres, *130 U. S., 43*), and no such statutory right of redemption exists in Oklahoma (Payne *vs.* Long-John Lumber Co., *60 Pac., 235*).

While, as just stated, the present application was not in the assertion of any right to redeem, yet it is proper to note how carefully the courts have ever guarded the rights of innocent purchasers, even without statutory provisions in that behalf.

For example, it has been held that the right to reimbursement of a purchaser in good faith and for a valuable consideration who has made improvements upon the property can be supported upon general principles of equity, without regard to statutory provisions (Pryor *vs.* Boyd, *1 Story, 478*).

And, in like manner, a purchaser at a foreclosure sale who has made valuable improvements in the belief that he has a clear and absolute title is entitled to be paid for them, in case the premises are redeemed.

The authorities upon this subject are so exceedingly numerous that it is hardly deemed necessary to refer to them. The attention of the court is, however, asked to the case of Canal Bank *vs.* Hudson (*111 U. S., 66, 82*), and to Jones on

Mortgages (vol. 2), §§ 1128 and 1129, etc., wherein the various authorities are referred to.

Aside, however, from the principles of equity properly applicable to this question, namely, that the mortgagor can only be reinstated in the possession of property upon the condition of making reimbursement and compensation, the statutes of Oklahoma, §§ *620* (4498) to *632* (4510), known as the "Occupying claimant's act," furnish complete protection in respect of innocent purchasers claiming and holding title in good faith. These sections clearly show how carefully the Territory of Oklahoma has undertaken to safeguard and protect the property rights and interests of those whose titles are founded upon judicial proceedings and good faith.

The provisions of these sections are intended to be beneficial in application. They, in terms, expressly save and protect the rights of *bona fide* purchasers of property under judicial proceedings, an adverse and better title to which is subsequently set up by others, and it is therein provided that such innocent purchasers "*shall not be evicted or thrown out of possession*" until paid the full value of improvements made, etc. Said sections further provide just how such value shall be ascertained, assessed, and the payment thereof secured and enforced.

Hence it further appears that the decree in this case, undertaking to summarily eject the appellant Harding from said property without the slightest reimbursement of any kind whatsoever, was absolutely in defiance of the most explicit statutory provisions.

It is not denied that he was a *bona fide* purchaser for value, and that, without the slightest notice of any adverse claim, he was permitted to remain in quiet possession, and to expend several thousand dollars in improving the property and in establishing his residence thereon before any question was raised as to the validity of his title.

Similar statutory provisions have frequently been passed upon by the courts, and the constitutionality of such legislation upheld, and its provisions construed and applied in ac-

cordance with the manifest purpose of such statutes, namely, "to secure and give to each one, as near as may be, his own" (Henting *vs.* Redden, *1 Kan. App., 163*).

Without undertaking to here quote at length from the various cases in which similar statutes have received consideration by the courts, the attention of the court is asked to the following cases, wherein will also be found an extended citation of authorities:

Henting *vs.* Redden (*1 Kan. App., 163*);
Ditzler *vs.* Wilhite (*55 Kan., 200*);
Stephens *vs.* Ballou (*25 Kan., 618*);
Stebbins *vs.* Guthrie (*4 Kan., 353*);
Glick *vs.* Gregg (*19 Ohio, 57*), and
Beardsley *vs.* Chapman (*1 Ohio St., 119*).

In the case of Krause *vs.* Means (*12 Kan., 335*) the court, by Brewer, J., thus refers to the considerations having a proper bearing in connection with the case there under review (and which same considerations exist here):

"What equitable claim has the defendant in error (Means) upon these improvements? Her labor never put them there; her money never paid for them. Shall she take the fruits of his toil and money without compensation?"

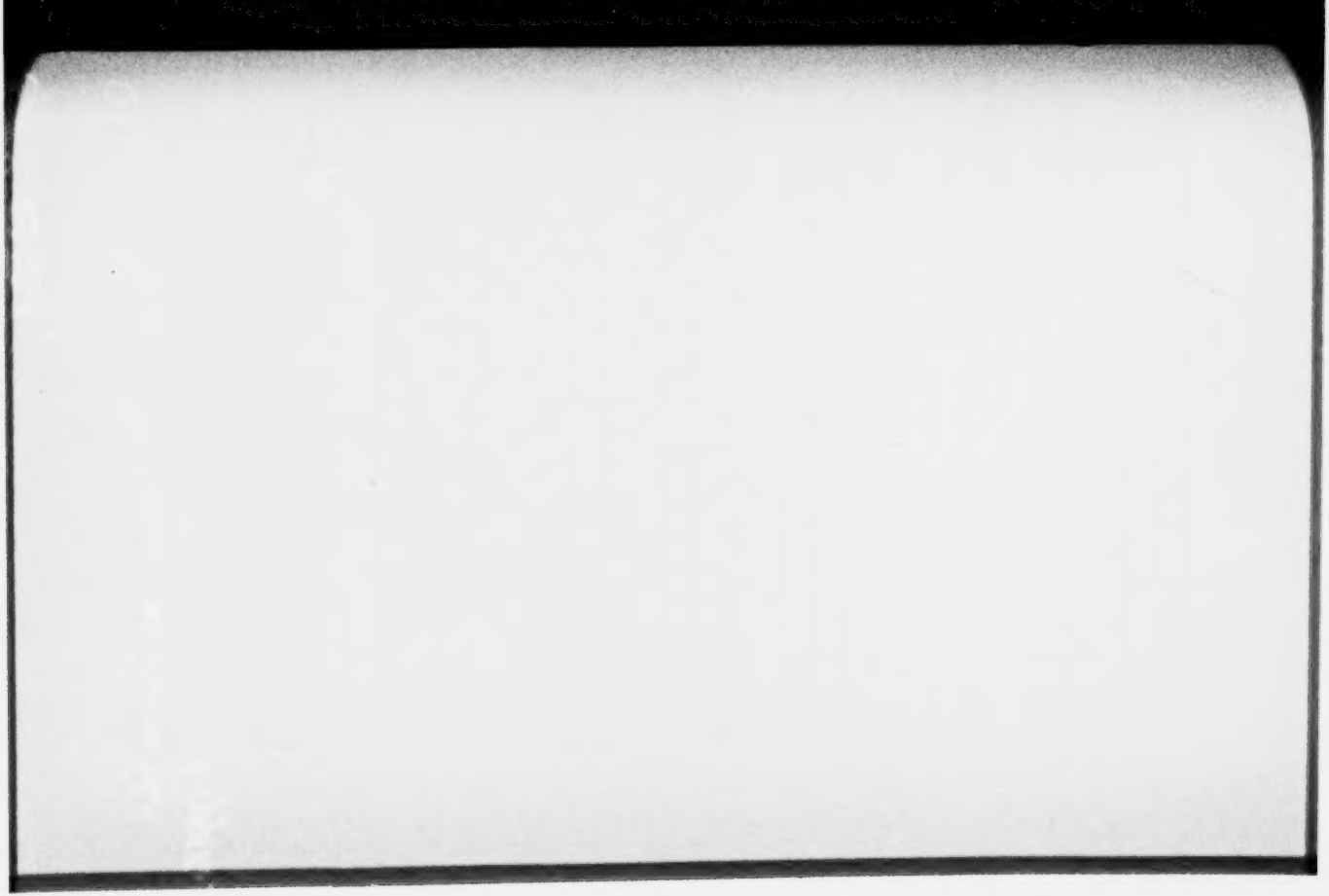
Without further prolonging the discussion it would seem to result that under no conceivable theory was it proper or permissible to evict the appellant Harding without reimbursement or compensation.

## V.

THE DECREE OF THE COURT BELOW WAS ERRONEOUS AND SHOULD BE REVERSED.

For all of the foregoing reasons it is respectfully submitted that the decree below was erroneous, and that the same should be reversed.

A. A. HOEHLING, JR.,
CHARLES S. WILSON,
*Attorneys for Appellants.*



# Supreme Court of the United States.

**OCTOBER TERM, 1901.**

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*No. 263.*

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JOHN ROMIG AND DANIEL W. HARDING,
APPELLANTS,

*vs.*

MYRTLE GILLETT.

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APPEAL FROM THE SUPREME COURT OF THE TERRITORY OF OKLAHOMA.

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## Supplemental Brief on Behalf of Appellants in Resistance of Motion to Dismiss.

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FACTS.

Motion to dismiss this appeal was made and submitted at the last term of court. It was therein insisted that the record failed to show affirmatively the jurisdictional sum or value in dispute. That allegation is completely refuted by the record (*R.*, *2*, *3*), and is uncontradicted. The motion was by the court postponed until hearing on the merits.

Appellee, in a supplemental brief recently filed, again

presses the motion, and now insists that the judgment is not final, thus stating the contention:

"It is merely an interlocutory order, setting aside a judgment in the district court of Garfield county, Oklahoma Territory, in an action for the foreclosure of a mortgage for $700" (*Appellee's Brief, p. 12*).

In reply to such contention, the attention of the court is asked to the brief heretofore filed in resistance of said motion, and also to the following additional considerations:

December 18, 1896, judgment entered, decreeing sale to satisfy mortgage, etc. (*R., 18–20*).

February 23, 1897, property sold to John Romig; sale confirmed March 1, 1897 (*R., 22–26*).

March 9, 1897, conveyance by sheriff to said purchaser (*R., 27–29*).

March 9, 1897, conveyance by John Romig to Daniel W. Harding (*R., 27–29*).

May 11, 1898, motion filed on behalf of Myrtle Gillett, "*to set aside the judgment* in said cause rendered against her on the 18th day of December, 1896, in above court, *and all proceedings had thereunder*" (*R., 29*).

April 15, 1899, judgment and decree of the said district court—

"that said judgment is void; that the order of sale, advertisement of sale, report of sale, and the sheriff's deed thereunder are each and all wrongful and void; *and that said judgment, order of sale, advertisement, sale, report of sale, and sheriff's deed are each and all set aside and held for naught*" (*R., 40, 41*).

June 21, 1889, supplemental judgment and decree directing the eviction of Harding from the property, and to reinstate appellee in possession, etc. (*R., 44, 45*).

June 30, 1900, judgment and decree *affirmed*, on appeal to the supreme court of the Territory (*R., 53, 54*).

Under this state of the record, the question is raised by appellee whether the judgment here under review is *final?*

The mere fact that the foreclosure suit involved a mortgage indebtedness of $700, interest and costs, is not here material or important. The mortgage was foreclosed, the property was sold, and the proceeds arising therefrom applied to the satisfaction of the mortgage. Harding became the purchaser of the property *in consequence* of said sale in foreclosure, and thereupon proceeded to convert it from unimproved prairie land by erecting thereon a residence, buildings, etc., until, at the time of the appeal herein, it had become of the value of $5,500, exclusive of costs (*R., 1–3*).

The judgment here under review was not one simply setting aside a judgment in foreclosure and remanding the case to be proceeded in *de novo* in the foreclosure suit (as claimed by appellee). It had passed far beyond that stage. The court undertook to decree absolutely null and void, and to set aside and hold for naught, not only the *judgment* in foreclosure, but the *sale and conveyance* made thereunder; and, further, to evict Harding from his possession of the property.

In short, it undertook to *finally* deprive appellant Harding of property worth at least $5,500, and to finally and for all time vacate and set aside his title thereto.

It would be difficult to conceive of any judgment more completely and effectually *final*, so far as Harding's rights are concerned, than said action of the court.

In appellants' brief herein on the merits, it is shown that such action was in utter defiance of the express statutory provisions of Oklahoma, which, having authorized the reversal of judgments under certain conditions, add:

"But the title to any property, the subject of the judgment or order sought to be opened, which by it, *or in con-*

*sequence* of it, shall have passed to a purchaser in good faith, shall *not* be affected," etc. (§ *77*).

* * * * * * *

"Such reversal shall not defeat or affect the title of the purchaser or purchasers," etc. (§ *482*).

* * * * * * *

"Where a judgment is modified, all liens and securities obtained under it shall be preserved to the modified judgment" (§ *590*).

* * * * * * *

"Any person in quiet possession of any land, and holding the same under sale and conveyance made * * * in pursuance of any order of court or decree in chancery, where lands are or have been directed to be sold, * * * shall not be evicted or thrown out of possession * * * until * * * paid the full value of all lasting and valuable improvements made," etc. (§ *620*).

These rights, so expressly secured and reserved to appellant by statute, were denied him and ignored, thus *finally* disposing of his rights and dispossessing him of his property.

The argument advanced in support of the motion to dismiss proceeds upon the theory that the judgment was one of *reversal* only, and authorities are cited to show that such judgments are not appealable.

Such authorities, however, are not applicable to the situation here presented. Here the appellant is finally deprived of his title and property (worth in excess of the jurisdictional amount), and from that judgment he has appealed. That judgment decides the title to the property in dispute; it annuls the judgment and sale in foreclosure, as well as the deed through and under which he claims; it also directs the property to be delivered to appellee and awards execution. It matters not that the main cause of action may still remain pending between the original parties.

It has been repeatedly held that where rights are thus finally disposed of the action of the court is final and appealable.

Thus, in Whiting *v.* Bank (*3 Pet., 15*) it was held that a decree of foreclosure and sale is final, from which an appeal may be taken, without awaiting the return and confirmation of the sale. (See, also, Ray *v.* Law, *3 Cranch U. S., 179*; Bronson *et al v.* Railroad Co., *2 Black U. S., 524.*)

In Blossom *v.* R. R. Co. (*1 Wall., 655*) it was held that a purchaser at judicial sale makes himself thereby so far a party to the proceedings that he has a right of appeal in respect of all matters adjudicated after his bid.

In Williams *v.* Morgan (*111 U. S., 684*) the right of such purchaser to be heard on the question of compensation to trustees and others, both in the trial and appellate courts, is affirmed.

In Kneeland *v.* Trust Co. (*136 U. S., 89*) the right of such purchaser to be heard, both in the trial court and on appeal, is recognized and affirmed.

In Mining Co. *v.* Mason (*145 U. S., 349*) an appeal was entertained by one who interposed, after confirmation, for the purpose of setting aside the sale and opening the biddings upon an advance bid made by himself.

See also Magann *v.* Segal (*92 F. R., 252*).

In Forgay *v.* Conrad (*6 How., 201*) it was held that the decree deciding the title there in dispute, annulling certain deeds under which certain of the defendants claimed, directing the property to be delivered to complainant, and awarding execution, was final, although the decree retained the cause for the purpose of taking certain accounts as between complainant and certain other defendants.

The same thing was reaffirmed in Thomson *v.* Dean (*7 Wall., 342*).

The same question of jurisdiction has frequently arisen in connection with intervening petitions and orders dismissing the same. Such judgments are uniformly held to be appealable, because such action completely and finally disposes of

the severable right and interest asserted, although the suit between the original parties is still pending undetermined.

See Standley *v.* Roberts (*59 F. R. 836*) and the authorities cited in the opinion.

Also—

Grant *v.* Lowe (*89 F. R., 881*).
Trust Co. *v.* R'y Co. (*48 id., 850*).
Grant *v.* R. R. Co. (*50 id., 795*).
Potter *v.* Beal (*50 id., 860*).
Withenbury *v.* U. S. (*5 Wall., 819*).
Hill *v.* R. R. Co. (*140 U. S., 52*).

So, also, in Gumbel *v.* Pitkin (*113 U. S., 545–548*), where a third party (Gumbel) had intervened in a certain action for the purpose of claiming a prior lien upon property attached in that suit and in the hands of the sheriff, his intervening petition was dismissed, and he thereupon prosecuted a writ of error to this court. Motion was made to dismiss upon the ground that the judgment appealed from was not reviewable as final. This court declined to so hold, and stated:

"The order dismissing Gumbel's intervention disposes of his rights, and is a final judgment as to that issue, as to which he has a right to writ of error. The order distributing the proceeds of the sale is also final, as it disposes of the fund."

As was stated by this court in Bebee *et al. v.* Russell (*19 How., 283*):

"When a decree finally decides and disposes of the whole merits of the cause, and reserves no further questions or directions for the future judgment of the court, so that it will not be necessary to bring the cause again before the court for its final decision, it is a final decree."

The present case comes precisely within that definition; the court, by final decree of the highest tribunal of the Territory, has vacated and held for naught the title of appellant, and ordered his eviction from the property, thus finally disposing of his rights and settling for all time the controversy as between him and appellee.

That action was certainly a *final* adjudication, and as such reviewable on appeal.

The motion to dismiss should be *overruled.*

Respectfully submitted.

A. A. Hoehling, Jr.,
Charles S. Wilson,
*Attorneys for Appellants.*

Cr. 1901. No. 264.

FILED
MAR 5 1901
JAMES H. McKENNEY,
Clerk.

Brf. of Springer for Appellee (on

294

IN THE SUPREME COURT

Filed Mar. 5, 1901.

OF THE

# UNITED STATES OF AMERICA.

JANUARY TERM, 1901.

DANIEL W. HARDING } Plaintiff Appellant,
vs.
MYRTLE GILLETT, } Defendant Appellee.

**Brief and Argument of Defendant's Appeal.**

**Motion to Dismiss.**

GEO. P. RUSH,

Att'y for Plaintiff.

Wm M Springer

Of Counsel for Appellee

# IN THE SUPREME COURT

OF THE

# UNITED STATES OF AMERICA.

JANUARY TERM, 1901.

DANIEL W. HARDING } Plaintiff Appellant,
vs.
MYRTLE GILLETT, } Defendant Appellee.

**Brief and Argument of Defendant's Appeal.**

**Motion to Dismiss.**

The appeal should be dismissed for the following reasons:

1st. The amount involved is not sufficient to give the court jurisdiction.

2nd. The jurisdiction is determined by the amount directly involved in the decree appealed from, and not by any contingent demands or losses of either party.

3rd. Because the decree appealed from is a joint decree against John Romig and Daniel W. Harding in favor of Myrtle Gillett, and John Romig is not made a party to this appeal.

4th. The main or original cause of action is still pending and undisposed of in the District Court of Garfield county, Oklahoma.

The suit was to foreclose a mortgage given by Don Gillett to John Romig for $700.00. After giving the mortgage, Don Gillett conveyed the property to Myrtle Gillett. Suit to foreclose the mortgage was commenced and service had upon Don Gillett and MYRTLE GILLETT by publication. The judgment was rendered and land sold and bought in by Romig and conveyed to Harding. Afterwards Myrtle Gillett filed her motion to set

aside the judgment upon the grounds that the service was void as to her. The motion was sustained and the judgment set aside, and the sheriff was ordered to restore her to the possession of the land.

Now the only thing involved in this suit is the judgment setting aside the decree of foreclosure for $700.00 and interest.

The fact that Harding's title depends upon the validity of this judgment cannot give the Supreme Court jurisdiction to review it.

"The jurisdiction is determined by the amount directly involved in the decree appealed from, and not by any contingent demands or losses of either party."

Hollander vs. Fickheimer, 162 U. S. 326.
Security Co. vs. Gay, 145 U. S. 12.

That part of the judgment which restores Myrtle Gillett to possession pending the further proceedings in the foreclosure suit would not give the Supreme Court jurisdiction, as that only involves the value of the right of possession.

Willis vs. Eastern Trust & Banking Co., 167 U. S. 76.

All the parties interested must be made parties to the appeal.

Beardsley vs. Arkansas & L. R'y Co., 15 Sup. Ct. R. (West) 786.

Sipperly vs. Smith, 155 U. S. 86.

Wilson vs. Kiesel, 164 U. S. 248.

Davis vs. Mercantile Trust Co., 152 U. S. 590.

This last case is especially important, as it holds that the purchaser at a foreclosure sale and the mortgagor are both necessary parties to an appeal.

The original foreclosure suit is still pending in the District court of Garfield county, Oklahoma. The judgment setting aside the decree of foreclosure for the reason that there was no service on Myrtle Gillett simply leaves the foreclosure suit pending there and they can get service upon her and proceed at any time.

Myrtle Gillett having been wrongfully dispossessed by an order of the court, it had jurisdiction and it became its duty to restore her to possession of the land pending the foreclosure.

Ency. Pleading and Practice, Vol. 2, page 965 et seq.

Chamberlain vs. Choles, 35 N. Y. App. 477.

GEO. P. RUSH,

Att'y for Plaintiff.

Wm. M. Springer

Of Counsel for Appellee

APR 29 1901
JAMES H. McKENNEY,
Clerk.

Motion to quash supersedeas.

IN THE SUPREME COURT

Filed April 29, 1901.
OF THE

# UNITED STATES.

OCTOBER TERM, 1900.

JOHN ROMIG AND
DANIEL W. HARDING,
Appellants,

vs.

MYRTLE GILLETT,
Appellee.

No. 584.

## MOTION TO QUASH SUPERSEDEAS.

Now comes the Appellee in this cause and moves this Honorable Court to vacate and quash the order of Supersedeas entered in this cause by the Honorable Bayard T. Hainer, Associate Justice of the Supreme Court of Oklahoma Territory on the 24th day of January A. D. 1901. The order itself and also the record of the judgment entered in said

cause signed by the Clerk of said Court on the 16th day of February, A. D. 1901, are hereto attached and made a part of this motion.

The grounds for this motion are that, as will appear from the said order of Supersedeas and the said record of the judgment in this cause, the judgment of the Supreme Court of Oklahoma, from which this second appeal has been taken in this cause, was entered on the 15th day of September, A. D. 1900, and that this second appeal was taken from the judgment of the Supreme Court of Oklahoma Territory in this cause on the 22d day of January, 1901, and that the Supersedeas order was entered in said cause on the 24th day of January, A. D. 1901, which was more than 60 days after the rendition of judgment in said cause, or 130 days. While appeals may be taken from the final judgment of the Supreme Court of a Territory within two years after rendition of judgment, yet in order to obtain a Supersedeas, the appeal or writ of error must be taken within 60 days after rendition of the judgment from which the appeal is taken.

Appellee therefore moves this Honorable Court

to vacate and quash the said order of Supersedeas issued in this cause.

GEO. P. RUSH,
WILLIAM M. SPRINGER,
Attorneys for Appellee.

---

To J. M. WILSON and C. R. BUCKNER and
L. N. HOUSTON,
Attorneys of record for Appellants in the above entitled cause:

You are hereby notified that the Appellee in the above entitled cause will on Monday, the 29th day of April, A. D. 1901, on the meeting of the Supreme Court of the United States, on that day, or as soon thereafter as Counsel can be heard, submit for the consideration of the Court the foregoing motion, and the Brief thereon hereto attached.

GEO. P. RUSH and
WILLIAM M. SPRINGER,
Attorneys for Appellee.

---

Service of above notice is hereby acknowledged this 13th day of April, 1901, at Enid, in Garfield

County, Oklahoma, by delivery of a copy thereof.

L. N. HOUSTON and

C. R. BUCKNER and

J. M. WILSON,

Attorneys for Appellants.

APR 29 1901
JAMES H. McKENNEY,
Clerk.

Motion to dismiss.

# IN THE SUPREME COURT

Filed April 29, 1901.

# OF THE UNITED STATES.

OCTOBER TERM, 1900

JOHN ROMIG AND
DANIEL W. HARDING,
Appellants,

vs.

MYRTLE GILLETT,
Appellee.

No. 584.

## MOTION TO DISMISS.

Now comes the appellee in this cause and moves this Honorable Court to dismiss the appeal herein, because she says this Court has no jurisdiction of the same, or to hear and determine the matters sought to be brought before the Court by such appeal.

GEO. P. RUSH and
WILLIAM M. SPRINGER,
Attorneys for Appellee.

To J. M. WILSON and C. R. BUCKNER and
L. N. HOUSTON,
Attorneys of record for Appellants in the above entitled cause:

You are hereby notified that the Appellee in the above named cause will on Monday, the 29th day of April, A. D. 1901, on the meeting of the Supreme Court of the United States, on that day, or as soon thereafter as Counsel can be heard, submit for the consideration of the Court the foregoing motion, and the Brief thereon hereto attached.

GEO. P. RUSH and
WILLIAM M. SPRINGER,
Attorneys for Appellee.

---

Service of this notice acknowledged this 13th day of April, 1901, at Enid, in Garfield County, Oklahoma, by delivery of a copy thereof.

L. N. HOUSTON and
C. R. BUCKNER and
J. M. WILSON,
Attorneys for Appellants.

APR 29 1901
JAMES H. McKENNEY,
Clerk.

Extract from Record.

# IN THE SUPREME COURT OF THE UNITED STATES.

Filed April 29, 1901.

OCTOBER TERM, 1900.

JOHN ROMIG and
DANIEL W. HARDING,
Appellants,
vs.
MYRTLE GILLETT,
Appellee.

No. 584.

**Extracts from MSS. Record, Printed by Appellee, in Support of Motion to Dismiss Appeal.**

GEO. P. RUSH AND
WILLIAM M. SPRINGER,
Attorneys for Appellee.

# IN THE SUPREME COURT

OF THE

# UNITED STATES.

OCTOBER TERM, 1900.

JOHN ROMIG and
DANIEL W. HARDING,
Appellants,
vs.
MYRTLE GILLETT,
Appellee.

No. 584.

Extracts from manuscript Record, printed by Appellee in support of motion to dismiss appeal in this case:

## JUDGMENT OF FORECLOSURE.

In the District Court of Garfield County, Oklahoma Territory.

(Record, page 32.)

John Romig, Plaintiff,
vs.
Don A. Gillett and
Myrtle Gillett,
Defendants.

Journal Entry,
Case
No. 424.

December 18th, 1896.

Now on this day comes the said plaintiff, John

Romig, by his attorney, D. D. Temple, the said defendants, Don A. Gillett and Myrtle Gillett, come not but make default, although duly and legally served by publication for three consecutive weeks, in the WEEKLY EAGLE, a weekly newspaper printed and published in the city of Enid, Garfield county, Oklahoma Territory, and of general circulation in said Garfield county, Oklahoma Territory, and thereupon this cause came on for trial upon the petition herein, in open court. and with the consent of the court, waived the jury and submits his cause to the court. The court after hearing the arguments and the counsel find that all allegations and averments contained in the petition of said plaintiff, filed herein are true and that there was due $42.00 as interest on the principal of seven hundred ($700.00) dollars, on. the second day of February, 1896, and that the same is still due and unpaid at this date the sum of forty-two ($42.00) dollars from the said defendant, Don A. Gillett, and that the conditions of said mortgage were broken and by reason thereof the whole amount mentioned in said note and mortgage become due and payable, and that there is

due from the said defendant Don A. Gillett, to the said plaintiff on the note and mortgage sued on in this action the sum of seven hundred ($700.00) dollars, on the note mentioned in said petition; and sixty-six ($66.00) dollars, has interest due on the note, and the note specified that said indebtedness shall bear interest at the rate of twelve (12) per cent per annum, payable semi-annually in advance, and if said note was collected by suit an attorney fee of ten (10) per cent might be taxed as costs. (32d page.)

The court finds that the Defendant, Don A. Gillette, executed and delivered to the plaintiff, the mortgage deed set forth in said petition, on the following described real estate to-wit;

The east half of the northeast quarter of section eighteen (18) township twenty-two (22) range six (6) west of Indian Meridian, save and except a strip of land eighty feet wide off of the west side of said tract of land from the north to the southern boundary, and that said mortgage was duly recorded on the second day of February 1896, in the office of the Recorder of Deeds, of said Garfield County, Oklahoma Territory, in Book 2 at page 89.

That the deed from Don A. Gillett to Myrtle Gillette was made and executed subsequent to plaintiff's mortgage.

The court also finds that the said defendant Don A. Gillett made and delivered to the plaintiff, the seven hundred dollar note set forth in said petition, which said mortgage was given to secure. and that the forty-two dollars of interest was due on the second day of February, 1896, and unpaid, and before the commencement of this action, and is unpaid at this time and that the conditions of said mortgage having been broken, and that the whole of the debt secured by said mortgage was due, by reason of the default of the payment of the interest according to the terms of said mortgage, and the court further finds that the said plaintiff has a lien on the land, and the tenements in said petition described, by virtue of the mortgage, in said petition set out to secure the payment of said indebtedness.

It is therefore, considered, ordered, and adjudged by the court, that the plaintiff do have and recover all and from the said defendant Don A. Gillett the sum of ($42.00,) being the amount of default of in-

terest, and twenty-four dollars and fifty cents, accrued interests since commencement of the suit together with the principle mentioned in said petition of seven hundred dollars, by reason of said default in the payment of said interest, the amount found due with interest at the rate of twelve per cent per annum, from the date of this judgement and costs, and attorney's fees of seventy dollars, and that the premises described in said petition be sold to satisfy said judgement of seven hundred and sixty-six dollars and fifty cents, and cost of suit and an attorney fee of seventy dollars.

And it is further ordered and adjudged by the court, that in the case the said defendants, or any one of them, fails from and after the rendition of this judgement to pay the said plaintiff the said sum of seven hundred and sixty-six dollars and fifty cents, the amount so as aforesaid found due to said plaintiff, together with the interest thereon and the costs of this action, including the attorney fee of seventy dollars, an order of sale issued to the sheriff of said county and Territory, commanding him to advertise and sell according to

law, the lands and tenements in said petition described to-wit:

The East one half of the northeast quarter of section 18, township 22 north, range 6 west Indian Meridian, except a strip of land eighty feet wide off of the west side of said tract of land from the north to the southern boundary, lying and situated in the County of Garfield, Oklahoma Territory, and apply the proceeds arising from the sale.

First, to the payment of the costs of said sale and of this action and attorney fees.

Second, to the payment to the said plaintiff, said sum of seven hundred and sixty-six dollars and fifty cents the amount so as aforesaid found due the said plaintiff with the interests thereon.

Third, the residue, if any there be, he pay to the defendant, Don A. Gillett; and it is further ordered and adjudged by this court that from and after the sale of this land and tenements under and by the virtue of this judgment and decree, that the said defendant Don A. Gillett and Myrtle Gillett and all persons claiming under them, since the commencement of this action be, and are

forever barred, foreclosed of, and from all liens upon the right, title, interest, estate or equity or redemption of, in, or to said lands and tenements or any part thereof, and the Sheriff is hereby directed to place in possession the purchaser of said property.

[Signed] JNO. L. MCATER, Judge.

[Endorsed.] No. 424.

Journal Entry of Judgment.

Filed Jan. 20, 1897.

J. C. MCCLELLAND, Clerk.

By M. A. ALEXANDER, Deputy.

February 17, 1899. By order of sale, credit on Judgment of $298.10.

ORDER CONFIRMING SALE.

In the District Court, in and for the Fifth Judicial District, Garfield County, Oklahoma Territory.

(Record page 45.)

| | |
|---|---|
| JOHN ROMIG, Plaintiff, vs. Don A. Gillett and Myrtle Gillett, Defendants. | No. 424 Journal Entry. |

And now comes the said plaintiff, by D. D. Temple, his attorney, and on motion of said plain-

tiff, and on producing to the court the return of the Sheriff of this county, of a sale of real estate made by him on the 23rd day of February, 1897, to the said plaintiff, John Romig, on an order of sale, issued in this case and date the twenty-first day of January, 1897, and the court having carefully examined the proceedings of said Sheriff in making said sale, being satisfied that said sale has been made in all respects in conformity to law and the statutes in such cases made and provided. It is ordered and adjudged by the court that said sale and the proceedings be, and the same are hereby in all respects confirmed, and the Clerk of said court is hereby directed to make an entry on the journal that the court is satisfied with the legality of such sale, and the said Sheriff is ordered to execute to said John Romig, the said purchaser at said sale, a good and sufficent deed for said lands and tenements, so sold towit:

The east half of the northeast quarter, section 18, township 22, range 6 west of the Indian Meridian, lying and situate in the County of Garfield and Territory of Oklahoma, save and except a strip of land 80 feet wide off of the west side of said tract

of land from the north to the southern boundary.

It is further ordered that the said purchaser of said premises at said sale, be let into possession of said premises, and every part thereof, and that said defendants and every person who has come into possession under them, or either of them, since the commencement of this action, deliver possession thereof to said purchaser, on the production of the Sheriff's deed for said premises, and on refusal of the said defendants, or either of them, or any one in possession under them, or either of them as aforesaid, to deliver possession of said premises to said purchaser, that the Sheriff of said County put the said purchaser of said premises into possession of the same.

JOHN L. MCATEE,
Judge of the Fifth Judicial District,
Oklahoma Territory.

[Endorsed.]

No. 424.
John Romig, Plaintiff,
vs.
Don A. Gillett et al,
Defendants.

## JOURNAL ENTRY ON CONFIRMATION OF SALE.

Filed March 1, 1897.

J. C. McCLELLAND,
Clerk of Dist. Court.
By C. J. WEST, Deputy.

## MOTION TO SET ASIDE JUDGMENT.

(Record page 51.)

Thereafter, on the 11th day of May, 1898, Myrtle Gillett filed a motion to set aside the judgment heretofore rendered in favor of John Romig, against said Myrtle Gillett and Don A. Gillett. From the judgment of the Court upon the hearing of said motion, and the ruling of the Court upon the same, this appeal is taken, which motion, notice, and affidavits in the support of the same, is in words and figures as follows:

In the District Court of Garfield County,
Oklahoma Territory,

John Romig, Plaintiff,
vs.
Don A. Gillett and
Myrtle Gillett, Defendants.

### MOTION TO SET ASIDE JUDGMENT.

Comes now the defendant, Myrtle Gillett, and

appearing for the purposes of this motion duly moves the Court to set aside the judgment in said cause rendered against her on the 18th day of December, 1896, in above Court, and all the proceedings had thereunder, for the reasons following, to-wit:

1st. That the Court had no jurisdiction of the defendant, Myrtle Gillett.

2nd. Because said Court had no jurisdiction to render said judgment.

3rd. Because the defendant was at all times during the pending of said action a resident of the Territory of Oklahoma, and was personally present therein during all aforesaid time and lived openly and notoriously within twenty miles of the real estate upon which the mortgage in said action was attempted to be foreclosed, and which was attempted to be sold under the order of sale issued in said cause, upon a farm in said Territory, where she had resided since the spring of 1889, and where she was well and familiarly known by everybody in the neighborhood, and had been for years prior to the commencement of said action, and no summons was ever served upon her in said action.

4th. That the attempted service by publication had in said cause upon the said Myrtle Gillett was irregular and void for the reason that the said Myrtle Gillett was a resident of said Territory and had not absconded from her usual place of abode in said Territory, nor had she so concealed herself that process could not be served upon her, nor had she departed from this Territory, nor from the county of her residence, with the intent to delay or defraud her creditors, or to avoid service of summons, or keep herself concealed therein for the purpose of avoiding service of summons; and for the further reason that the affidavit filed in said cause for the purpose of obtaining such service is not such as the law requires to be filed therefor.

ANDERSON & RUSH,
Attorneys for Myrtle Gillett.

## JUDGMENT OF DISTRICT COURT OF GARFIELD COUNTY, OKLAHOMA.

Setting aside Judgment of District Court of Garfield County, (Record page 74,) March, 1899, Term. April 15, 1899. 35th Judicial day.

Among other things the following proceedings were had on this 15th day of April, 1899, the same

being the 35th Judicial day of the March, 1899, Term.

No. 424 John Romig, vs. Don A. Gillett.

And now on this 15th day of April, this cause coming on to be heard and the motion heretofore filed in this cause by the defendant, Myrtle Gillett, to vacate and set aside the judgment heretofore rendered in this cause and all the proceedings had thereunder as to her, the said Myrtle Gillett, the Court doth find that as to the said defendant, Myrtle Gillett, the judgment is void for want of jurisdiction, and that all the proceedings under said judgment were wrongful; that the order of sale should not have been issued; that the levy, advertisement and sale under said order of sale was wrongful and void; that the order putting the purchaser, John Romig, the plaintiff herein, into possession of said land and dispossessing defendant, Myrtle Gillett, was wrongful and an abuse of the process of this Court; that the possession of said John Romig and of his grantee, Daniel W. Harding, was wrongfully obtained and wrongfully maintained; that the defendant, Myrtle Gillett,

should in all respects be restored to her condition prior to entry of said void judgment and prior to her dispossession of said land by said void judgment under the void and unlawful order issued under said void judgment.

It is therefore ordered, adjudged and decreed that said judgment is void, that the order of sale, advertisement of sale, and the Sheriff's deed issued thereunder, are each and all wrongful and void, and that said judgment, order of sale, advertisement, appraisement, sale, report of sale and Sheriff's deed are each and all set aside and held for naught.

Judgment reserved upon the question of right of possession of————————and restitution.

To all of which plaintiff duly enters exception and by the Court overruled. (74.)

## ORDER OF DISTRICT COURT OF GARFIELD COUNTY, OKLAHOMA.

Restoring Appellee to possession of land. (Record page 81.) May, 1899. Term. June 21st, 1899. 7th Judicial day.

Among other things the following proceedings were had on this 21st day of June, 1899, the same

being the 7th Judicial day of the May, 1899, Term.

No. 424. John Romig, vs. Don A. Gillett and Myrtle Gillett.

And now on this 21st day of June, 1899, the same being the 7th day of the May Term of the said Court, this cause coming on again to be heard upon the motion of the defendant, Myrtle Gillett, to set aside the judgment of foreclosure in this cause, and all the proceedings had thereunder upon the question reserved in the decision made and entered at the last term of this Court upon said motion, it is further ordered and adjudged that Myrtle Gillett be restored to the possession of said premises, to-wit: The east half of the north-east quarter of section eighteen (18) in township twenty-two (22) north, of range six (6) west, save and except a strip of land eighty feet wide off of the west side of said tract of land from the north to the southern boundary thereof, situated in the County of Garfield and Territory of Oklahoma, and that the plaintiff, John Romig, and his grantee, Daniel W. Harding, are hereby commanded forthwith to quit and surrender to said

Myrtle Gillett the full and complete possession of said premises and of each and every part thereof; and it is further ordered that unless the said John Romig and his said grantee, Daniel W. Harding, have not quit and surrendered possession of said premises and of each and every part thereof prior to the expiration of fifteen days from this date that then, upon a precipe being filed therefor by the said Myrtle Gillett or her attorneys of record, an order shall be issued out of the office of the Clerk of this Court, and directed to the Sheriff of this County, commanding him to forthwith remove the said John Romig and his grantee, Daniel Harding, and each of them, and all persons claiming by, through, or under them, or either of them, from said premises, and put the said Myrtle Gillett into possession thereof; and it is further ordered that said Myrtle Gillett have judgment against the plaintiff, John Romig, and the said Daniel W. Harding, for costs in this case expended, taxed at ——— ———dollars, to which the plaintiff and Daniel W. Harding excepts.

And the notice for a new trial heretofore filed herein by the plaintiff coming on to be heard, the

same was by the Court overruled, to which action of the Court the plaintiff then and there excepted.

And the motion for a new trial heretofore filed herein by Daniel W. Harding coming on to be heard, the same was by the Court overruled, to which action of the Court in so overruling said motion, the said Daniel W. Harding then and there excepted.

And afterwards, to-wit: On the 24th day of June, 1899, the plaintiff, John Romig, filed his motion for new hearing on the motion of Myrtle Gillett for possession of land described herein, which motion was by the Court considered and overruled, to which action of the Court John Romig then and there duly excepted; and afterwards, to-wit: On the 24th day of June, 1899, the grantee of the plaintiff. Daniel W. Harding, files his motion for new hearing and affidavit in support thereof on the motions of the defendant, Myrtle Gillett, which motion was by the Court considered and overruled, to which action of the Court the said Daniel W. Harding then and there duly excepted; and thereupon the plaintiffs, John Romig and Daniel W. Harding, each gave notice of appeal to the Su-

preme Court of the Territory of Oklahoma, and said plaintiffs, John Romig and Daniel W. Harding, were each by the Court given thirty days time to make and serve case made for the Supreme Court of the Territory, and the defendant, Myrtle Gillett, was by the court given fifteen days thereafter to suggest amendments, and the case to be settled upon five days' notice.

And it was further ordered and adjudged by the Court that the plaintiffs, John Romig and Daniel W. Harding, give an appeal bond in the sum of One Thousand Dollars, conditioned as provided by law, and to be approved by the Clerk of said Court; upon the filing and approval of such bond no process shall issue on said order until the determination of said cause in the Supreme Court.

(From the MSS. Record, page 112.)

Certificate of Clerk.

United States of America, } In the Supreme Court of
Territory of Oklahoma. } ss. Oklahoma Territory.

John Romig and Daniel W. Harding, Appellants,

vs.

Myrtle Gillette, Appellee.

I, Benj. F. Hegler, Clerk of the Supreme Court

of the Territory of Oklahoma, do hereby certify that on the 15th day of September, 1900, a mandate was issued in conformity to law, to the District Court of Garfield County, of the Fifth Judicial District of the Territory of Oklahoma, sitting in and for Garfield County, affirming a judgment of said District Court entered in the Clerk's office to said District Court on the 21st day of June, 1899.

On the 29th day of September, 1900, an appeal was allowed by the Supreme Court of said Territory to the Supreme Court of the United States, for the review of the judgment and order of the Supreme Court of said Territory heretofore referred to, signed by Honorable John H. Burford, Chief Justice of the Supreme Court of Oklahoma Territory, and issued out of the Clerk's office of the Supreme Court of said Territory, giving the Appellants sixty days in which to perfect their appeal from the judgment of the Supreme Court of said Territory.

That afterwards, to-wit: At the October Term, 1900, of said United States Supreme Court, as evidenced by a mandate therefrom, which said mandate bears date December 28, 1900, said appeal

was docketed and dismissed with costs.

That afterwards, to-wit: On the 22d day of January, 1901, a second appeal of said cause was granted by the Honorable Bayard T. Hayner, Associate Justice of the Supreme Court of said Territory, and issued out of the Clerk's office of the Supreme Court of said Territory, giving the Appellant thirty days in which to perfect said second appeal from said judgement of said Supreme court of said Territory.

That afterwards, to-wit: January 25, 1901, the Supersedeas bond herein was duly filed, approved and signed by the Hon. Bayard T. Hainer, Associate Justice as aforesaid, and a certified copy of the Citation in this cause was duly served on the attorney for Appellee on the 8th day of February, 1901.

In testimony whereof, I have caused the seal of said Court to be hereunto affixed at the city of Guthrie in the Territory of Oklahoma, on the 16th day of February, A. D. 1901.

BENJ. F. HEGLER,

Clerk Supreme Court of Oklahoma Territory.

Brf. of Springer for Appellee (Mo. to dis.)

APR 29 1901
JAMES H. McKENNEY,
Clerk

IN THE SUPREME COURT
Filed April 29, 1901.
OF THE
UNITED STATES.

OCTOBER TERM, 1900.

JOHN ROMIG and
DANIEL W. HARDING,
Appellants,
vs.
MYRTLE GILLETT,
Appellee.

No. 584.

**Brief and Argument of Appellee in Support of Motion to Dismiss Appeal.**

GEO. P. RUSH AND
WILLIAM M. SPRINGER,
Attorneys for Appellee.

# IN THE SUPREME COURT

OF THE

# UNITED STATES.

OCTOBER TERM, 1900.

JOHN ROMIG and
DANIEL W. HARDING,
Appellants,

vs. No. 584.

MYRTLE GILLETT,
Appellee.

BRIEF AND ARGUMENT OF APPELLEE

In support of motion to dismiss Appeal.

The appeal should be dismissed for the following reasons:

1st. The amount involved is not sufficient to give the court jurisdiction.

2nd. The jurisdiction is determined by the amount directly involved in the decree appealed from and not by any contingent demands or losses of either party.

3rd. The main or original cause of action is

still pending and undisposed of in the District Court of Garfield county, Oklahoma.

The suit was to foreclose a mortgage given by Don Gillett to John Romig for $700. After giving the mortgage, Don Gillett conveyed the property to Myrtle Gillett. Suit to foreclose the mortgage was commenced and service had upon Don Gillett and Myrtle Gillett by publication. The judgment was rendered and land sold and bought in by Romig and conveyed to Harding. Afterwards Myrtle Gillett filed her motion to set aside the judgment upon the grounds that the service was void as to her. The motion was sustained and the judgment set aside and the sheriff was ordered to restore her to the possession of the land.

Now the only thing involved in this suit is the judgment setting aside the decree of foreclosure for $700 and interest.

The fact that Harding's title depends upon the validity of this judgment cannot give the Supreme Court jurisdiction to review it.

"The jurisdiction is determined by the amount directly involved in the decree appealed from, and not by any contingent demands or losses of either

party."

Hollahder vs. Fickheimer, 162 U. S. 326.

Security Co. vs. Gay, 145 U. S. 12.

That part of the judgment which restores Myrtle Gillett to possession pending the further proceedings in the foreclosure suit would not give the Supreme Court jurisdiction, as that only involves the value of the right of possession.

Willis vs. Eastern Trust & Banking Co., 167 U. S. 76.

By the act of congress of May 2, 1900, to provide a temporary government for Oklahoma Territory, it was provided as follows:

"Writs of error and appeals from the final decisions of said Supreme Court shall be allowed and may be taken to the Supreme Court of the United States in the same manner and under the same regulations as from the Circuit courts of the United States, where the value of the property or the amount in controversy, to be ascertained by oath or affirmation of either party or other competent witness, shall exceed five thousand dollars."

Sup. Rev. Stats. Vol. 1, Second Edition 1874-1891, page 724.

This provision has been disregarded. The "value of the property or the amount in controversy" is to be ascertained by the oath of either party, or by other competent witnesses and it must exceed five thousand dollars. The extracts from the record printed herewith show that the amount in controversy is less than one thousand dollars, and no affidavit has been put in the record ascertaining even that fact. If appellants rely, in support of their right of appeal to this court, upon a greater value than is indicated in the record, they should have shown affirmatively by affidavits what that value was.

The amount shown by the record and the pleadings, taken as a whole, when these disclose the real sum in dispute, is determinative of the question of jurisdiction. (11 Encyp. of P. and P. pages 713-4, and numerous authorities therein cited. including twelve cases decided by this court). Affidavits cannot contradict the record, and affidavits as to value of the land itself cannot confer jurisdiction when the only question involved is the setting aside a judgement of foreclosure for $700.

And the record must affirmatively show the amount in controversy in order that the court may take jurisdiction. (1 Encyp. of P. and P. page 717, and authorities therein cited). The amount will not be presumed The law raises no presumptions in the absence of affirmative showing of the amount in controversy as to what the real amount may be. Id.

The original foreclosure suit is still pending in the District court of Garfield county, Oklahoma. The judgment setting aside the decree of foreclosure for the reason that there was no service on Myrtle Gillett simply leaves the foreclosure suit pending there and they can get service upon her and proceed at any time.

Myrtle Gillett having been wrongfully dispossessed by an order of the court, it had jurisdiction and it became its duty to restore her to possession of the land pending the foreclosure.

Ency. Pleading and Practice, Vol. 2, page 965 et seq.

Chamberlain vs. Choles, 35 N. Y. App. 477.

GEO. P. RUSH AND
WILLIAM M. SPRINGER,
Attorneys for Appellee.

APR 29 1901
JAMES H. McKENNEY
Clerk

Brf. of Springer for Appellee (Mo. to Quash)

# IN THE SUPREME COURT OF THE UNITED STATES.

Filed April 29, 1901.

OCTOBER TERM, 1900.

JOHN ROMIG and
DANIEL W. HARDING,
Appellants,
vs.
MYRTLE GILLETT,
Appellee.

No. 584.

Brief of Appellee, in Support of Motion to Quash Supersedeas.

GEO. P. RUSH AND
WILLIAM M. SPRINGER,
Attorneys for Appellee.

# IN THE SUPREME COURT

## OF THE

# UNITED STATES.

## OCTOBER TERM, 1900.

JOHN ROMIG and
DANIEL W. HARDING,
Appellants,
vs.
MYRTLE GILLETT,
Appellee.

No. 584.

BRIEF OF APPELLEE,

In support of motion to quash Supersedeas.

The grounds upon which this motion is made are stated in the motion itself, namely that the appeal now being prosecuted was not taken within sixty days from the date of the rendition of final judgment in the cause but was actually taken 130 days thereafter;

Rev. Stats. U. S. Secs. 1007-1008.

The Supersedeas order and the record of the entry of judgment in the case, have been extract-

ed from the record in the case, and printed herewith for the information of the Court.

The statutory requirements as to the manner and time of suing out a writ of error or of perfecting an appeal must be strictly observed in order to effect a Supersedeas or stay of proceedings pending the appeal or writ of error. 20 Encyp. of P. and P. page 1216, and numerous authorities cited therein.

GEO. P. RUSH AND
WILLIAM M. SPRINGER,
Attorneys for Appellee.

RECORD ON MOTION TO QUASH SUPERSEDEAS—MSS. Page 112.

I, Benj. F. Hegler, Clerk of the Supreme Court of the Territory of Oklahoma, do hereby certify that on the 15th day of Sept. 1900, a mandate was issued in conformity to law, to the District Court of Garfield County, of the Fifth Judicial District of the Territory of Oklahoma, sitting in and for Garfield County, affirming a judgment of said District Court entered in the Clerk's office of said District Court on the 21st day of June, 1899.

On the 29th day of September 1900, an appeal was allowed by the Supreme Court of said Territory to the Supreme Court of the United States, for the review of the judgment and order of the Supreme Court of said Territory heretofore referred to, signed by Honorable John H. Burford, Chief Justice of the Supreme Court of Oklahoma Territory, and issued out of the Clerk's office of the Supreme Court of said Territory, giving the Appellants sixty days in which to perfect their appeal from the judgment of the Supreme court of said Territory.

That afterwards, to-wit: At the October Term, 1900, of said United States Supreme Court, as evidenced by a mandate therefrom, which said mandate hears date December 28, 1900, said appeal was docketed and dismissed with costs.

That afterwards, to-wit: On the 22d day of January 1901, a second Appeal of said cause was granted by the Hon. Bayard T. Hainer Associate Justice of the Supreme Court of said Territory, and issued out of the Clerk's office of the Supreme Court of said Territory, giving the Appellant thirty days in which to perfect said second appeal from said judgment of said Supreme Court of said Territory.

That afterwards, to wit: January 25, 1901, the Supersedeas bond herein was duly filed, approved and signed by the Hon. Bayard T. Hainer, Associate Justice as aforesaid, and a certified copy of the Citation in this cause was duly served on the attorney for Appellee on the 8th day of February, 1901.

In testimony whereof, I have caused the seal of said court to be hereunto affixed at the city of Guthrie, in the Territory of Oklahoma, on the

16th day of February, A. D. 1901.

BENJ. F. HEGLER,
Clerk Supreme Court of Oklahoma Territory.

Now, to-wit: On this 24th day of January, A. D. 1901, the appellants Daniel W. Harding and John Romig, having perfected their appeal from the judgment rendered against them in the above cause by the Supreme Court of the Territory of Oklahoma, to the Supreme Court of the United States of America, and now present their bond to stay proceedings under said judgment pending said appeal for approval; and it appearing that said Supersedeas bond is regular and sufficient, it is therefore ordered, considered and adjudged that all proceedings under said judgment in the Supreme Court of the Territory of Oklahoma, in the above cause, including the mandate from said Court, and all proceedings in the lower Court be and they are by this order Superseded and stayed pending the appeal of said Harding and Romig to the Supreme Court of the United States, and said Supersedeas Bond is hereby approved, and the mandate to the lower court recalled.

Witness my hand and seal of said Court this 24th day of Jan. A. D. 1901.

(Signed) BAYARD T. HAINER,
Associate Justice of the Supreme Court of Oklahoma Territory.

JAMES H. McKENNEY,
Clerk.

Brf. of Springer for Appellee

IN THE SUPREME COURT

Filed April 11, 1902.

OF THE

# UNITED STATES.

OCTOBER TERM, 1901.

JOHN ROMIG & DANIEL W. HARDING,
Appellants,
vs.
MYRTLE GILLETT,
Appellee.

No. 263

REPLY AND SUPPLEMENTAL BRIEF OF APPELLEE IN SUPPORT OF THE MOTION TO DISMISS THE APPEAL.

GEORGE P. ROSH & WILLIAM M. SPRINGER,
Attorneys for Appellee.

# In the Supreme Court

OF THE

# UNITED STATES.

—o—

OCTOBER TERM, 1901.

—o—

An examination of the brief of the appellants in resistance of the motion to dismiss this appeal will disclose the fact that counsel for appellants lays great stress upon the fact that the appellee had not printed sufficient of the record to disclose to the court all the facts bearing upon the points raised by the motion to dismiss.

The appellants admit that as to the affidavits as to the value of the land, the contention is well taken, as the affidavits were overlooked by counsel for appellee in the preparation of the brief upon the motion; but outside of the affidavits, we claim that there was not any diminution of the record upon the points presented by counsel for appellee upon the motion to

dismiss. And we now challenge counsel for the appellants to refer the court to any portion of the full record now filed with the court, which would aid them in passing upon such motion, which was not printed by the appellee and filed with the motion to dismiss, outside of the affidavits as to the value of the land.

In addition to the argument made and authorities cited in the brief of the appellee upon the motion to dismiss, we desire to call the Court's attention to the following propositions and authorities:

The law of Congress governs appeals to the United States Supreme Court.—Balt. etc., Railroad Co. vs. Presbyterian Church, 19 Wallace, 62 and 22nd Law Ed. 97.

There are many orders, interlocutory and otherwise, that are appealable by statute from the District to the Supreme Court of the different states and territories that are not appealable under the acts of Congress to the Supreme Court of the United States.

It is well settled that an appeal will not lie, in the absence of a statute, from an interlocutory order, judgment or decree. There must be a final judgment in a cause to permit a review.

People v. Thurston, 5th Cal. 517.
Tatum v. Yahm, 29th Southern 201.
Morse v. Rankin, 51 Conn. 325.
Allen v. Savannah, 9th Ga. 286.
Ex parte v. Thompson, 93rd Ill. 89.

Thompson v. Service, 90th Ind. 128.
Atchison Railroad etc. Co. v. Brown, 26 Kas. 443.
Howard v. Louisville etc, Railroad Co., 17th Ky. Law Rep. 814.
State v. Brown, 75th Maine 456.
Cunningham v. Carroll County, 48th Atlantic (Md.) 1046.
Comins v. Turner's Falls Co., 140th Mass. 146.
Holbrook v. Cook, 5th Mich. 225.
Johnson v. Board of Education, 65th Mo. 47.
Cooper v. Vanderveer, 47th N. J. L. 178.
Feist v 3rd Ave. R. Co,, 13 Misc. (N. Y.) 240.
25th N. Y. Civ. Proc. 257, 34th N. Y. Suppl. 57.
68 N. Y. St. 13.
Hailey v. Gray, 93rd N. C. 195.
Evans v. Iles, 7th Ohio State, 233.
Mackaness v. Long, 85th Pa. St. 158.
Whitfield v. Greer, 3rd Baxt. (Tenn,) 78.
Parris v. Mason, 37th Tex. 447.
Nelson v. Brown, 59th Vt. 600.
Tucker v. Sandridge, 82 Va. 532.
Hays v. Fischer, 102 U. S. 121, 26th ed. 95.

Interlocutory orders are appealable, in the absence of a permissius statute, only on appeal from a final judgment that is rendered in the cause.

Davie v. Davie, 52nd Ark. 224.
12 S. W. 558.
20th Am. St. Rep. 170.
Baker v. Baker, 10th Cal. 527.
De Barry v. Lambert, 10th Cal, 503.
Deluth Transfer Co. v. Deluth Terminal Co., 81st Minn. 63.
83rd N. W. 497.
Gilmore v. Ham, 61 Hun. (N. Y.) 1.
21st N. Y. Civ. Proc. 102.
15th N. Y. Suppl. 391.
39th N. Y. St,,
Bennett v. Shelton, 117 N. C. 103.
23rd S. E. 95.
Martin v. Flippin, 101 N. C. 452.

8th S. E. 345.
Nelson v. Brown, 59th Vt. 600.
Harper v. Vaughn, 87th Va. 426.
Schattschneider v. Johnson, 30th Wis. 387.

The judgment must determine the matter and leave nothing further to be determined.

Standley v. Hendrie etc. Mfg. Co. 55th Pac 723.
Guarantee Trust etc. Co. v. Philadelphia etc. Rld. Co., 69th Conn. 709.
McFarlan v. Larkin, 21st N. E. 565.
Thompson v. Pickel, 20th Ia. 490.
Riley v. Farnsworth, 116 Mass. 223.
Dcikhart v. Rutgers, 45th Mo. 132.
Wentworth v. Treanor, 31st N. H. 528.
Newark Plank Road etc. Co. v. Elmer, 9th N. J. Equity 754.
Dickenson v. Codwise, 11th Paige (N. Y.) 189.
Hoobs v. Beckwith, 6th Ohio State 252.
Hays v. Stewart, 23rd Vt. 622.
St Clair County v. Lovingston, 16th Wal. (U. S.) 628.
21st L. ed. 813.
Desvergeys v. Parsons, 60th Fed. 143.
23rd U. S. App, 239
8th C. C. A. 526.

The organic Act of the Territory of Oklahoma requires that before an appeal can be taken from the Supreme Court of the Territory to the Supreme Court of the United States, the matter involved must exceed the sum of $5,000.00. "Section 9 of the Organic Act of the Territory of Oklahoma."

In order to be appealable under the above section the matter directly involved must exceed the sum of $5,000.00 to give the right of appeal to the United States Supreme Court, a remote consequence and

mere incidental claims, or collateral effects of a judgment will not be considered.

Oakley v. Hibbard, 2nd Pinn. (Wis.) 21.
52 Am. Dec. 139.
Hollander v. Fechheimer, 162 U. S. 386.
40th L. ed. 985.
Abadie v. U. S., 149 U. S. 261.
37th L. ed. 726.
Cameron v. U. S., 146 U. S. 533.

A contingent loss or damage which may accrue to complainant can not be considered on the appeal to enjoin the levy of an execution.

Ross v. Prentiss, 3rd How. (U. S.) 771.

The jurisdictional amount must be determined by the amount in controversy in the particular proceeding, and not in the collateral effect of a decision upon the claims of other parties, or upon the defendants in another proceeding by the same parties.

U. S. v. Wannamaker, 147 U. S. 149.
Millaudon v. Judge, 6th Mart. N. S. (La.) 24.
Hosack v. Crill, 197 Pa. St. 370.

(In which is held that the amount actually in controversy controls, though the judgment may incidentally settle the right of future sums greatly in excess of the jurisdictional amount.)

Clay Center v. Farmers L. & T. Co., 145th U. S. 224.
36th L. ed. 685.
Rodier v. Lapierre, 21st Can. Supreme Ct. 69.
Dominion Salvage etc. Co. v, Brown, 20th Can. Supreme Ct. 203.

The particular demand controls.

Ross v. Prentiss, 3rd How. (U. S.) 771.

Where the possession is in issue the value of possession and not the title determines the jurisdiction.

Flagg v. Walker, 109th Ill. 494.
Norwood v. Wimby, 104th La. 645.
Harris v. Stockett, 35th La. Ann. 387.
Harris v. Barber; 129th U. S. 366.

In actions involving the validity of a judgment, the amount of the judgment determines the appellate jurisdiction, where the appellate jurisdiction depends upon the pecuniary amount.

Singer v. McGuire, 40th La. Ann. 638.
4th So. 578.
Factors etc. Ins. Co. v. New Harbor Protection Co., 39th La. Ann. 583.
2nd So. 407.

In many of the states appellate jurisdiction is given to the Supreme Courts where the title to real estate may be involved regardless of the amount or value of the real estate; but in such cases, in order to give the appellate court jurisdiction, the title to real estate must be directly involved.

Hahn's Peak etc. & Canal etc. Min. Co. vs. Lees, 62nd Pac. 841.
Paddack v. Staley, 49th Pac. 281.
Wiatt v. Larimer Irrigation etc. Co., 33d Pac. 144.
Carbine v. Fox, 98th Ill. 146.
Duckworth v. Mosier, 4th Ind. Appl. 267.

Newell v. Daniels, 5th Kans. App. 505.
47th Pac. 565.
Bourne v. Beck, (Ky. 58 S. W. 690.
DeBlois v. New Orleans, 45th La. Ann. 1308.
14th So. 190.
Larue V. Smith, 153 N. Y. 428.
Hill v. Water etc, Com'rs. 150 N. Y. 547.
Miele v. Deperino, 135th N. Y. 618.
Bassett v. Bassett, 5th Cinc. L. Bul. 440.
Farmers Bank v. Hoof, 7th Pet. (U. S.) 168.

Counsel for appellants in their brief opposing the motion to dismiss this appeal, try at great length to convince the Court that all the equities of this case are with the appellee, and that this court should strain the law, if necessary, to award the land to the appellants in this case, and call the Court's attention to the great value of the land and to the improvements placed upon it by the appellants. But they fail to call the Court's attention to the fact that on the 23rd day of February,1897, the appellee, John Romig, bought this land for the enormous sum of $475—(see original record page 39, printed record page 23), and within a few days, to-wit: On the 9th day of March, 1897, Romig sold the land to the appellant, Daniel W. Harding, for the sum of $900.00 (see original record, page 67, printed record, page 37), and that, too, without any actual or constructive notice to the owner of the land, Myrtle Gillett, who was a resident of the Territory of Oklahoma, and who had resided open and notoriously within twenty miles of the land

in controversy, and of a sitting of the court where the judgment was rendered, continuously from the filing of the original suit and up to the time of the filing of the application to set aside the judgment on the 11th day of May, 1898.

Harding cannot claim that he is an innocent purchaser of the land because he was chargable with constructive notice, at all times, of the condition of the record, and of the fact that no legal service had ever been had upon Myrtle Gillett, and, according to the statement of his counsel in their brief, on page nine, he had actual notice of the condition of said record. It is there stated "without her undertaking to repeat in detail what had been above stated, it is proper to remind the Court that appellant, Harding, having caused examination to be made of the several orders, decrees and proceedings had therein, and finding the same, so far as they appear of record, to be regular in form and in supposed compliance with the law, being a purchaser of the property from Romig for a valuable consideration in perfect good faith and without notice."

If he examined or caused to be examined the record he had not only constructive but actual notice of the condition thereof, and it is immaterial that he supposed that the record was in compliance with the law, because knowing the exact condition of the record

he was chargable with notice of the fact that such record showed that there had been no service upon the defendant, Myrtle Gillett.

Appellants counsel claim, pages three and four of their brief, that the appellee was guilty of great latches in filing her motion to set aside the judgment.

The record shows that the land was sold on the 23rd day of February, 1897, see original record page 48, printed record page 28, and that on the 11th. day of May, 1898, the appellee filed her motion to set aside the judgment, and the record shows that she had no actual or constructive notice of the pendancy of such action until long after the rendition of the judgment, and the sale of said land. See original record page 52-3 and 4, printed record page 29, 30 and 31.

In the case of Carey V. Reaves, 46th, 577, the affidavit to set aside the void judgment was filed 22 years after the rendition of the judgment, and the judgment was finally set aside 30 years afterwards.

Where there is a void judgment the mere lapse of any length of time will not stop the rightful owners of the property from setting up their title to the same. "A void judgment is in legal effect no judgment. By it no rights are vested. From it no rights can be obtained. Being worthless in itself all proceedings founded upon it are worthless. It neither binds or bars anyone. All acts performed under it,

and all claims flowing out of it are void. The parties attempting to enforce it will be responsible as trespassers. The purchaser at a sale finds himself without title and without redress. The first and most material inquiry in relation to a judgment or decree then, is in reference to its validity. For if it be null, no action on the part of the plaintiff, no inaction on the part of the defendant, no resulting equity in the hands of third persons, no power resting in any legislature or other department of the government can invest it with any of the elements of power or of validity. This inquery is to be presented only on an investigation of jurisdictional facts, upon whose real or assumed existence every valid judgment must stand."

In any event, this is not on appealable order, that is, such an order as is appealable to the Supreme Court of the United States. It is merely an interlocutory order setting aside a judgment in the District Court of Garfield County, Oklahoma Territory, in an action for the foreclosure of a mortgage for $700.00. The judgment being set aside as to the defendant, Myrtle Gillett, if called a service, leaves the action of foreclosure still pending in that court.

The order resisting Myrtle Gillett was prepared and read and was only the exercise of the inherent power of a court of equity to prevent the

abuse of its process. The court in this case found that Myrtle Gillett had never been served with process in this cause, and that therefore, she had never been a party to such action, and that, so far as she was concerned, the judgment was a nullity, and that having been a purchaser of the title from Don Gillett, prior to the institution of the suit, and having been wrongfully dispossessed of said land under a writ of assistance issued out of said court, that she should be restored to the possession from which she had been wrongfully ousted by the improper order of the Court.

In Skinner vs. Peatty, 15th California, 156, it is held, that "If a writ of assistance be improperly issued or executed, the court can, on summary motion. set it aside and restore the possession. The same doctrine is enunciated in the case of Wiley vs. Carlisle, 93rd Ala., 237. "Where a writ of assistance is set aside, the party dispossessed under it is entitled to be restored to the possession of the premises."

Chamberlain v. Choles, 35th N. Y., 477.
3rd Abb. Prac. (N. S.), 118.
Meiggs v. Willis (Com. Pl.) 8th Civ. Proc. R., 125.

Respectfully submitted.

GEORGE P. RUSH,

WILLIAM M. SPRINGER,

Attorneys for Appelle.

IN THE

# Supreme Court of the United States.

OCTOBER TERM, 1901.

JOHN ROMIG AND DANIEL W. HARDING,
APPELLANTS,
*v.*
MYRTLE GILLETT,
APPELLEE.

*No.* 263.

## BRIEF AND ARGUMENT OF COUNSEL FOR APPELLEE.

### STATEMENT OF FACTS.

In the "Brief on behalf of appellants in resistance of motions to quash supersedeas and to dismiss appeal," filed in this case during the October Term of this court, 1900, there is, on pages 2, 3, 4, 5, and 6, a statement of the facts in this case. This statement by appellants presents the facts in a manner most favorable to support their contentions. It is not accepted as correct by the appellee. In the Opinion of the Supreme Court of Oklahoma (Printed Record, page 54), will be found a state-

ment which is impartial and which is sufficiently comprehensive to advise this court of the points at issue.

Hence, appellee will not reproduce a statement of the facts in this brief.

## BRIEF.

1. It seems to be conceded by the appellants that a publication made upon an affidavit, sworn to upon information and belief, is wholly defective, but if it is not admitted, it is well settled by the following authorities:

Sylph Mining and Milling Co. *v.* Williams, 36 Pac. 80.

Thompson *v.* Higginbotham, 18th Kan. 44.

Thompson *v.* Higginbotham, 14th Kan. 224.

City of Atchinson *v.* Bartholow, 4th Kan. 124.

No attempt was made to amend the affidavit by swearing to it positively, for they could not in truth do so, as Myrtle Gillett had resided within 20 miles of the sitting of the court, and such an affidavit can only be amended so as to speak the facts as they existed at the time of making the original affidavit.

Long *v.* Fife, 25 Pac. 594.

Frybarger *v.* McMillen, 25 Pac. 713.

2. All the steps necessary to give the court jurisdiction must be taken to sustain service by publication.

Strode *v.* Strode, 52 Pac. 161.

3. If affidavit for publication set up a cause of action different from that set up in the petition, the defect is fatal.

Vermont Loan and Trust Co. *v.* McGregor, 51 Pac. 104.

4. The description of the land in the petition and affidavit herein are not the same. The description in the affidavit included the lands described in the petition and other lands.

5. Counsel claim that although the affidavit is not sufficient upon the question of non-residence, yet the following statement in the affidavit for publication is sufficient to give the court jurisdiction, viz: "Affiant further says that he is unable and that plaintiff is unable by using due diligence to obtain service of summons on the defendants within the Territory of Oklahoma." Affiant further states that on the —— day of March, 1896, he caused a summons to be issued in said cause for said defendants directed to the sheriff of Garfield county, Oklahoma Territory. Sheriff made return, "Defendants not found in my county."

The statute reads as follows (Sec. 3951):

"Before service can be made by publication an affidavit must be filed, stating that the plaintiff with due diligence is unable to make service of the summons upon the defendant or defendants to be served by publication, and showing that the case is one of those mentioned in the preceding section.

6. The judgment sought to be set aside in this action is found on pages 32, 33 and 34 of the original, and pages 18, 19 and 20 of the printed record.

The affidavit of publication upon which the original judgment in this case was based, was found on pages 27 and 28 of the original, and pages 15 and 16 of the printed record.

The motion to set aside the judgment is found on pages 51 and 52 of the original, and pages 29 and 30 of the printed record. And the affidavit of Myrtle Gillett in

support of the motion is found on page 54 of the original, and 31 of the printed record.

7. So far as appellee, Myrtle Gillett, is concerned, this is a proceeding to exclude her from any interest in the real estate sought to be sold under the mortgage. The allegation in the petition in relation to her is as follows:

"Plaintiff further states that the defendant, Myrtle Gillett, has or claims to have some interest or lien on said premises or part thereof, and if any she may have, it is junior, inferior, and subject to the plaintiff's mortgage deed."

In the affidavit for publication it is stated:

"That said defendant claims a lien upon, or right, title, estate, interest, claim or equity of redemption in or to said premises or some part thereof, and inferior to the rights of said plaintiff, and praying judgment for the amount due said plaintiff on the said indebtedness for the foreclosure of said mortgage. That the lien, claim, interest, estate, and equity of redemption of the said defendants in and to the said premises, if any they have, be determined and settled, and that said plaintiff be adjudged to have the first lien and claim upon said premises."

The journal entry in said cause recites:

"That the deed from Don A. Gillett to Myrtle Gillett was made and executed subsequent to the plaintiff's mortgage, * * * and it is further ordered and adjudged by the court that in case the said defendants or any one of them fails from and after the rendition of this judgment to pay the said plaintiff * * * an order of sale issue to the sheriff of said county and Territory, commanding him to advertise and sell according to law the lands and tenements in said petition described, * * * and it is further ordered and adjudged by this court from and after the sale of this land and tenements under and

by virtue of this judgment and decree, that the said defendants, Don A. Gillett and Myrtle Gillett, and all persons claiming under them since the commencement of this action be and are hereby forever barred, foreclosed of and from all liens upon the right, title, interest, estate, or equity of redemption of, in, or to said lands and tenements or any part thereof."

Now, Section 3950, referred to above by Section 3951, provides:

"Service may be made by publication in either of the following cases: * * * in actions which relate to, or the subject of which is real or personal property in this Territory, where any defendant had or claims a lien or interest, actual or contingent therein, or the relief demanded consists wholly or partially in excluding him from any interest therein, and such defendant is a non-resident of the Territory or a foreign corporation."

8. It is not only necessary by Section 3951 that the affidavit show that service cannot be made within this Territory with due diligence, but it must also show that it is one of the cases mentioned in Section 3950, which it wholly failed to do by reason of the fact that the affidavit as to non-residence is fatally defective. In this case, in order to come within the purview of Section 3951, the affidavit must not only allege that service cannot be made upon the defendant with due diligence within this Territory, but also that she was a non-resident of the Territory, as that would be the only way in which it would show that the case was one of those mentioned in Section 3950.

9. But is the affidavit sufficient, independent of the fact that it fails to allege that the appellee, Myrtle Gillett, was a non-resident? That is, concede for the sake of argument that it was not necessary for the affi-

davit to state that she was a non-resident, and that if it showed that service could not be made upon her by the use of due diligence, that then the court would have had jurisdiction, is the affidavit then sufficient? We think not. In Kohn *v.* Matthai, 115 California, 47, p. 698, it is held that:

"An affidavit for publication stating that the plaintiff's attorney placed the summons and complaint in the hands of five different persons (naming them) for service, and that they returned them, with the information that they could not find the defendant and that she could not be found in the city or county, is insufficient, without showing what diligence was used to procure service on her."

In Victor Mill Co. *v.* Justice, &c., 1st P. (Nev.) 831, it was held:

"Where a summons to a foreign corporation is returned not served, and the affidavit states that plaintiff could not, after due diligence find defendant within the State, neither of these things tend to prove that there was no officer of defendant in the State on whom personal service could be had."

In Palmer *v.* McMaster, 33 P. (Mont.) 132, it was held:

"Since the statute requires an affidavit on which an order of publication is made to state that defendant cannot be found after due diligence, it is insufficient to allege merely that the defendant has departed from the Territory and cannot be found therein, without stating that diligence has been made to obtain personal service."

In Alderson *v.* Marshall, 16 P. (Mont.) 576, it was held:

"Under session laws of Montana, 1883, providing for service by publication when the defendant, after due

diligence, cannot be found, and an affidavit stating these facts is filed with the clerk, a publication based on an affidavit alleging due diligence but not stating the facts showing the diligence is void."

10. In contrast to these we will quote a decision where the affidavit was held good. In Ligare *v.* Cal. S. R. Co., 18 P. (Cal.) 854, it was held:

"Under code civil procedure (Cal. Sec. 412), providing for an order of publication, if the defendant cannot, after due diligence, be found within the State, an affidavit to obtain such an order, which states that defendants have been sought for to obtain service or summons thereon, but after diligent search and inquiry cannot be found within the State, and that affiant has made inquiry of all persons from whom he could expect to obtain information as to the residence of defendants; that summons and alias summons had been placed in the hands of the sheriff of the county where the suit was instituted, and of the sheriffs of several other counties, and that all such writs were returned unserved after diligent search for defendants, is sufficient to show due diligence when attacked collaterally."

11. These cases hold that an affidavit must allege facts which show that due diligence had been used and that the defendant could not be found. Oklahoma also holds that the affidavit "should set out definitely what diligence had been used to serve summons upon defendant," Raymond *v.* Nix, 49 Pac. 1113.

12. But it may be claimed by counsel for appellants that the statement "That plaintiff is unable, by using due diligence, to obtain service of summons on the defendants within the Territory of Oklahoma," is an allegation of an ultimate fact and is sufficient under the statute. We think that the affidavit ought to set out the

facts showing the diligence; yet conceding that it might generally be true that it is an allegation of ultimate fact and could be so alleged, yet in this case we do not think that the allegation in the affidavit in this case is sufficient for this reason: that the affidavit does not stop with that allegation, but goes on to state what diligence was used, as follows: "Affiant further states that on the 4 day of March, 1896, he caused a summons to be issued in said cause for said defendants, directed to the sheriff of Garfield county, Oklahoma Territory. Sheriff made return, defendants not found in my county." Having stated the diligence he is presumed to have stated all the diligence used, and that the affiant understood when he swore that he could not make service by the use of due diligence, that the diligence stated constituted due diligence, and upon a proceeding for perjury could defeat the action by stating that he thought the facts stated in the affidavit constituted due diligence, and that he set up in the affidavit what had been done. Affidavit should at least state that plaintiff had used due diligence; as it stands now, it is only an expression, under oath, that service could not be made by the exercise of due diligence.

13. There is another phase of this affidavit which we think is absolutely fatal to it even upon the theory of the appellant, Mr. Harding, and that is that there is nowhere a statement in the affidavit that the appellant and his attorney did not at all times know that the appellee, Myrtle Gillett, resided in Kingfisher county, within 20 miles of the sitting of the court, at the time of the issuance of the summons, the filing of the affidavit, and the entry of judgment, &c.

14. The affidavit does say that "Affiant further says that he is unable and that the plaintiff is unable by using due diligence to obtain service of summons on the defendants

within the Territory of Oklahoma." The affiant says the defendants, *i. e.*, both of them. It might have been true that they could not get service of summons upon the defendant, Don Gillett, and they might have known this, and then they could have truthfully made the affidavit filed in this case, although they may have known that Myrtle Gillett resided upon her farm in Kingfisher county.

15. If the affidavit should have said the service of summons could not be made upon defendant Don Gillett or Myrtle Gillett, or if it had said that service could not be made upon the defendants or either of them, it would have stated that Myrtle Gillett could not be served, but to say that the defendants could not be served is simply an allegation that all could not be served, and is not an allegation that none could not be served. If such an affidavit could be upheld it would certainly open the door for the practice of great fraud. A plaintiff could, by joining one non-resident with several resident defendants, make an affidavit that the defendants could not be served in the Territory, and proceed to get service of summons by publication, and by not calling the attention of the resident defendants to the overdue interest, or otherwise calling their attention to the default, lull them into forgetfulness of their obligation or into carelessness in regard to it, and get judgment of foreclosure and sell the property without their knowledge, as was done in this case.

16. In constructive service where a man's property is taken away from him without any actual notice to him, every provision of the statute should be construed strictly in order to give the court jurisdiction.

This case illustrates how easily a great wrong might be done a resident defendant, if affidavit of the character of the one in this case be upheld.

Every resident of this Territory is entitled to be served

personally, unless it be shown that it cannot be done with reasonable diligence, and that the case is one mentioned in section 950.

17. If sheriff's return of service falsely shows that it was made by delivery, to the defendant himself, of a copy, the defendant cannot contradict the return, but he has a right of action against the sheriff for a false return. If the return shows that service was made by leaving a copy at the usual place of residence, the defendant can come in after judgment and have the judgment set aside as void for the reason that it was not, as a matter of fact, left at his usual place of residence.

Hanson *v.* Walcott, 19th Kansas, 207, and cases cited.

In the case *supra*, the sheriff's return showed that he had left the summons at the usual place of residence. The defendant came and showed that the place at which the sheriff had left the summons was not his place of residence. The court said:

"It is conclusively shown in this action within the decision of Bond *v.* Wilson, 8th Kan. 228, that the judgment of the court below was rendered against the plaintiff in error, without any service of summons upon him, and that the judgment is void, as the court had no jurisdiction of the person of the said Hans Hanson."

18. If the defendant has a right of action against the sheriff for a false return, in case he is not actually served, and the sheriff makes such return, and can have the judgment set aside as void, in case the return shows that the summons was left at the usual place of residence of the defendant, and it was not; then it certainly seems to us that in case of service by publication, even if the affidavit was positive that service could not be made upon the de-

fendant with diligence (setting up the facts showing such diligence), and that the defendant was a non-resident of the Territory, when in truth and in fact he was a resident of the Territory, and that his residence could easily have been ascertained and service made upon him, that he ought to be permitted to show these facts, and the judgment set aside as void. This is the doctrine in Oklahoma, see:

Hockaday *et al. v.* Jones, 56 Pacific (Okla.), page 1054.

In this case it is held that if a person resides within the Territory, he must be personally served. The court, in this case, overlooks Section 4471, which authorizes the action of the court in that case, and decided that independent of that section and under the inherent power of the court, the court would set aside a void judgment.

If not, what protection has he? He cannot sue the sheriff for a false return; the plaintiff or the person who made the affidavit may be insolvent, and though his property may be taken and sold without his knowledge he will be without remedy. It might be claimed that he might proceed against the party who made the affidavit for perjury. That would be a very poor satisfaction in any event and a very doubtful proceeding under all circumstances. But, in the present case, even that source of satisfaction would be cut off. Upon an indictment for perjury, the defendant would answer: "I only swore that I believed the defendants were non-residents and I did believe it; and I only swore that service of summons could not with due diligence be made upon the defendants in this Territory, and that was true, for at that time the defendant, Don Gillett, was a non-resident and absent from the Territory, and further that it was his real opin-

ion that service could not be made by the use of diligence." It does not seem to us that the appellants have a leg to stand on in any way this case may be reviewed.

19. The record shows that the sale of this land took place February 23, 1897; that it was confirmed March 1, 1897; that thereafter the sheriff made a deed to plaintiff; that on March 9, 1897, plaintiff sold it to Harding. The testimony shows that Myrtle Gillett did not know anything about the suit or proceedings "until long after the sale of said land." (See Myrtle Gillett's affidavit.) So it appears that she did not know anything about the matter until after the sale of land to Harding. But if she had known all about it all the time it would have made no difference, as it would have been incompetent to show it.

Roberts *v.* Roberts, 31 P. 941. Freeman on Judg., Sec. 117.

20. The counsel for appellants do not at all comprehend the scope of appellee's motion if they believe as stated in their brief that it was filed under Section 3955 of Statutes 1893. That section authorizes a defendant who has been PROPERLY served by publication to come in at any time within three years and be let in to defend upon a showing that he had no actual notice of the suit and that he has a defense to the action; but this section has no application to the case at bar, in which it is alleged that the judgment is void: 1st, For want of proper service; and, 2d, That the action was not brought in the county in which the defendant resided.

21. Neither does Section 4468 have any bearing upon the case at bar; that Section has reference to proceeding under Section 4464 where the parties were PROPERLY in court, but where by reason of the facts stated in Section 4464 judgment was erroneously or wrongfully entered.

For the information of the counsel we will say that the motion was filed under Section 4471, which provides * * * "A void judgment may be vacated at any time on motion of a party or any person affected thereby," and under the power inherent in all courts of general jurisdiction to vacate and set aside a void judgment upon their attention being called to it.

22. "A void judgment may be vacated and set aside at any time on motion of the defendant, without advising the court that the defendant has a valid defense to the action in which the pretended judgment is rendered."

Hanson *v.* Walcott, 19 Kans. 207.
Bond *v.* Wilson, 8 Kans. 228.
Gapen *v.* Stephenson, 17 Kans. 616.
Mastin *v.* Gray, 19 Kans. 468.
Kirkwood *v.* Reedy, 10 Kans. 455.
Green *v.* McMurtry, 20 Kans. 193.
Peerce *v.* Butler, 21 Kans. 124.
McNeill *v.* Edie, 24 Kans. 110.
Bank *v.* Sewing Society, 28 Kans. 424.
Tracy *v.* Green, 29 Kans. 510.
Reynolds *v.* Fleming, 30 Kans. 106.
Williams *v.* Moorehead, 33 Kans. 618.

23. When a judgment is sought to be set aside for the reason of some defect in the affidavit of publication the constant practice in Kansas is to do so by motion filed in the original case as Myrtle Gillett has done in this case.

Harrison *v.* Beard, 30 Kans. 532.
Hanson *v.* Walcott, 19 Kans. 207.
Washburn *v.* Buchanan, 34 P. Kans. 1049.
Grouch *v.* Martin, 27 P. Kans. 985.
Land *v.* Fife, 25 P. Kans. 594.

24. Under the Kansas practice such a judgment as this can be impeached and set aside, even in an action in eject-

ment upon proof *aliunde* to show that the court did not have jurisdiction.

Mastin *v.* Gray, 19 Kans. 458.
McNeill *v.* Edie, 24 Kans. 110.
Kay *v.* Walters, 28 Kans. 115.
Perry *v.* St. Joseph W. R. Co. 29 Kans. 424.
Brinkman *v.* Shafer, 23 Kans. 531.

25. Counsel for appellants claim that the appellee is estopped by her laches. In Carey *v.* Reaves, 46 Kans. 571, judgment was set aside as void. Suit was brought 22 years after affidavit was filed, and finally decided and judgment set aside 30 years after.

26. Counsel, in their brief, say: "This is an action *in rem* and the *res* gives the court jurisdiction," and cites some authorities. Now, these authorities are not in point for these reasons: 1st. If the *res* did give jurisdiction it would be only upon proper affidavit and publication, which are lacking in this case; and, 2d, an examination of the statutes under which they arose will disclose the fact that the statute fixes the venue at the place where the *res* was; whereas our Organic Act fixes the venue of all civil actions in the county in which the defendants, or either of them, reside or may be summoned. See last half of 2d subdivision of Article 10 of the Organic Act. It reads: "And all civil actions shall be instituted in the county in which the defendants, or either of them, reside or may be found.

27. Counsel upon their claim that Myrtle Gillett is estopped from making this motion, cite in support of such contention—

Freeman on Execution, Sec. 307, and
Capital Bank *v.* Huntoon, 35th Kans., 577.

Neither is applicable. Sec. L, 307 of Freeman, relates to motion to set aside judicial sales "FOR IRREGULARITIES

IN THE SALE and not for want of jurisdiction to render the judgment." The case in the 35th Kansas is also a case to set aside sale for IRREGULARITIES AND FRAUD PRACTICED AT THE SALE, and it was held that the motion was not made in time, but in the same opinion the court held that the sale was VOID as to some of the real estate, and as to those lots the action was in time, and uses the following language:

> "Under the great weight of authority we think it must be held that the sale of these eight lots is void, and that such sale must be held void in the present action, or in any action or proceeding." See subdivision 6 of said opinion.

28. In addition to these authorities, counsel cites Williams *v.* Ives, 49th Illinois, 512, and Runell *v.* Brown, 41st Illinois, 184, and Orwed *v.* Kempsman, 28th Fed. 36. We have not been able to examine these last authorities, but suppose they are equally as inapplicable, as counsel seem to be unable to grasp the idea that the judgment itself is void, as shown by the affidavit introduced upon the motion.

29. The doctrine of estoppel or limitation does not apply to a void judgment.

Statute Oklahoma 1893, Section 4471.

Freeman on Judg., Sec. 117, which reads as follows:

"A void judgment is in legal effect no judgment. By it no rights are vested From it no rights can be obtained. Being worthless in itself all proceedings founded upon it are worthless. It neither bids nor bars any one. All acts performed under it, and all claims flowing out of it, are void. The parties attempting to enforce it may be responsible as trespassers. The purchaser at a sale finds himself without title and without redress. The first and

most material inquiry in relation to a judgment or decree, then, is in reference to its validity. For if it be null, no action upon the part of the plaintiff, no inaction upon the part of the defendant, no resulting equity in the hands of third persons, no power residing in any legislature or other department of the government, can invest it with any of the elements of power or of validity. This inquiry is to be prosecuted only by an investigation of jurisdictional facts upon whose real or assumed existence every valid judgment must stand."

30. A mortgage in Oklahoma is a mere security and does not convey or grant the title, even on condition (Stat. of Okla. 1893, Secs. 3255, 3258, 3259, 3260 and 3261). It will be noticed by Section 3257 that the title to the real estate which is subjected to the security for the payment of the debt is not attempted to be passed, but simply "mortgaged to the mortgagee" to secure the payment of his debt.

To emphasize the fact that the legislature never intended that the title should ever pass, Sec. 3259 provides: "Mortgages of real property may be acknowledged or proved, certified, and recorded in like manner and with like effect as GRANTS thereof."

It is a mere lien. (Secs. 3185, 3186, 3187, Stat. Oklahoma, 1893.)

Notwithstanding an agreement to the contrary, a lien or a contract for a lien transfers no title to the property to the lien. (Sec. 3190, Statutes of 1893.)

All contracts for the forfeiture of property subject to lien in satisfaction of the obligation, and all contracts in restraint of the right of redemption from a lien are void. (Sec. 3191, Stat. 1893.)

31. The appellants have cited numerous authorities to the effect that a mortgagee in possession could not be

ousted even in ejectment until his debt was paid. But we desire to call the attention of the court to the fact that in all these cases they were common law mortgages in which the title to the real estate was passed to the mortgagee or statutory mortgages in which the common law mortgage was made the "statutory mortgage" and the title was passed to the mortgagee upon default of the mortgaged debt. But the court will observe a different doctrine by an examination of the following authorities, viz:

Jones on Mortgages, Sec. 717, 29 Mich., p. 44; 12 Mich., p. 270; 48 Tex. 270; 52 Iowa, pp. 215–217; 30 Mich., p. 380.

In this connection we desire to call the special attention of the court to the 7th Pac. 893, and to Jones on Mortgages, Sec. 1678, *et seq.*, and to the case of Payne *v.* Long-Bell Lumber Co. (Okla.).

32. By the records and findings of the court, it appears that Myrtle Gillett had no actual or legal notice of the pendency of the suit until after the sale of the land.

GEO. P. RUSH AND
WM. M. SPRINGER,
*Attorneys for Appellee.*

# Supreme Court of the United States.

No. 52.—October Term, 1902.

John Romig and Daniel W. Harding, Appellants, *vs.* Myrtle Gillett. } Appeal from the Supreme Court of the Territory of Oklahoma.

[November 17, 1902.]

On February 2, 1895, Don A. Gillett made and delivered to John Romig a note for seven hundred dollars, secured by a mortgage on eighty acres in Garfield County, Oklahoma. On February 6, 1895, the mortgagor sold and conveyed the real estate to Myrtle Gillett. On March 11, 1896, the mortgagee Romig commenced an action of foreclosure in the District Court of that county against Don A. Gillett and Myrtle Gillett. In the petition Myrtle Gillett was alleged to have some interest in the real estate, but junior and subsequent to plaintiff's mortgage. A summons was issued and returned not served, the sheriff certifying that the defendants were not found in Garfield County. On June 2 plaintiff filed an affidavit for publication, which affidavit disclosed fully the nature of the action and the relief sought, and added:

"Affiant further says that he is unable and that the plaintiff is unable by using due diligence to obtain service of summons on the said defendants within the Territory of Oklahoma.

"Affiant further states that on the — day of March, 1896, he caused a summons to be issued in said cause for said defendants, directed to the sheriff of Garfield county, Oklahoma Territory. Sheriff made return, 'Defendants not found in my county.'

"Affiant further states upon information and belief that the said defendants Don A. Gillett and Myrtle Gillett are non-residents of the Territory of Oklahoma, and that service of summons cannot be made on the said defendants Don A. Gillett and Myrtle Gillett within the said Territory of Oklahoma, and that said plaintiff wishes to obtain service upon said defendants by publication; and further affiant sayeth not."

Publication was made and proof thereof filed as required by the statutes. On December 18, 1896, a judgment of foreclosure was entered against both defendants and a sale of the real estate ordered. An order of sale was issued on January 20, 1897. A sale was made to the plaintiff and confirmed by the court March 1, 1897, and an order entered directing the sheriff to execute a deed to the purchaser and put him in possession. A deed was accordingly made and the plaintiff put in possession on March 9, 1897. Thereafter Daniel W. Harding purchased the property from the

plaintiff Romig, received a deed therefor and entered into possession on March 10, 1897. He improved the property, which up to that time was unimproved prairie land, by the erection of three residences and other permanent structures of the value of $2,000, paid taxes to the amount of $200, and has ever since resided thereon.

On May 11, 1898, Myrtle Gillett filed a motion to set aside the judgment, and all proceedings had thereunder, on the ground that the court had never acquired any jurisdiction; that she was at all times during the pendency of the action a resident of the Territory of Oklahoma, living in an adjoining county and within twenty miles of the mortgaged real estate, and that she had no knowledge of the institution or prosecution of the cause until long after the sale of the land by the sheriff. Upon the hearing of this motion the court entered an order setting aside the judgment and all subsequent proceedings, and directing that she be put in immediate possession of the premises. This order and judgment of the trial court was affirmed by the Supreme Court of the Territory on June 30, 1900, (10 Oklahoma, 186,) whereupon the case was brought here on appeal.

The statutes of Oklahoma of 1893, which were in force at the time of these proceedings, required that actions for the foreclosure of a mortgage be brought in the county in which the real estate is situated. Section 3950 authorized service by publication in such cases "where any or all the defendants reside out of the Territory, or where the plaintiff with due diligence is unable to make service of summons upon such defendant or defendants within the Territory." Sections 3951, 3955 and 4498 read as follows:

"SEC. 3951. Before service can be made by publication an affidavit must be filed stating that the plaintiff, with due diligence, is unable to make service of the summons upon the defendant or defendants to be served by publication, and showing that the case is one of those mentioned in the preceding section. When such affidavit is filed the party may proceed to make service by publication."

"SEC. 3955. A party against whom a judgment or order has been rendered without other service than by publication in a newspaper, may at any time within three years after the date of the judgment or order have the same opened and be let in to defend. Before the judgment or order shall be opened, the applicant shall give notice to the adverse party of his intention to make such an application, and shall file a full answer to the petition, pay all costs, if the court require them to be paid, and make it appear to the satifaction of the court, by affidavit, that during the pendency of the action he had no actual notice thereof in time to appear in court and make his defense; but the title to any property, the subject of the judgment or order sought to be opened, which by it, or in consequence of it, shall have passed to a purchaser in good faith, shall not be affected by any proceedings under this section."

"SEC. 4498. In all cases, any occupying claimant being in quiet possession of any lands or tenements for which such person can show a plain

and connected title in law or equity, . . . or being in quiet possession of and holding the same by deed . . . from and under any person claiming title, as aforesaid, . . . or being in quiet possession of and holding the same under sale on execution or order of sale against any person claiming title, as aforesaid, . . . or any person in quiet possession of any land claiming title thereto, and holding the same under a sale and conveyance made . . . in pursuance of any order of court or decree in chancery where lands are or have been directed to be sold, and the purchasers thereof have obtained title to and possession of the same without any fraud or collusion on his, her or their part, shall not be evicted or thrown out of possession by any person or persons who shall set up and prove an adverse and better title to said lands, until said occupying claimant, his, her or their heirs, shall be paid the full value of all lasting and valuable improvements made on said lands by such occupying claimant, or by the person or persons under whom he, she or they may hold the same previous to receiving actual notice by the commencement of suit on such adverse claim by which eviction may be effected."

Mr. Justice BREWER delivered the opinion of the Court.

The Supreme Court of Oklahoma was of opinion that the affidavit for service of publication was wholly insufficient in that it alleged the non-residence of defendants simply upon information and belief and not positively; that being so insufficient the defendant Myrtle Gillett was not brought into court, and the judgment and all subsequent proceedings were as to her absolutely void. On the other hand, it is contended by the appellants that a separate ground for service by publication is "where the plaintiff with due diligence is unable to make service of summons . . . within the Territory;" that the affidavit for publication stated positively such inability; that therefore it was strictly within the statute, and authorized the publication of notice; that the publication was duly made, the defendants were thereby brought into court and the judgment and all subsequent proceedings were regular and valid. It may well be doubted whether this contention of appellants can be sustained, at least in cases like this of direct and not collateral attack, even if the inability to obtain personal service by the exercise of due diligence is a distinctive ground for service by publication. It would seem that the facts tending to show such diligence should be disclosed and that an affidavit merely alleging inability was one of a conclusion of law and not of facts. (*McDonald* v. *Cooper*, 32 Fed. Rep. 745; *Carleton* v. *Carleton*, 85 N. Y. 313; *McCracken* v. *Flanagan*, 127 N. Y. 493; *Ricketson* v. *Richardson*, 26 Cal. 149; *Braly* v. *Seaman*, 30 Cal. 610; *Kahn* v. *Matthai*, 115 Cal. 689; *Little* v. *Chambers*, 27 Iowa, 522; *Thompson* v. *Shiawassee Circuit Judge*, 54 Mich. 236; *Alderson* v. *Marshall*, 7 Mont. 288.) Nor is this inability shown by the mere fact that a summons issued to the sheriff of the county in which the land is situated is returned not served, for in

cases of this kind by section 3934 a summons can be issued to and served in any county of the Territory.

But while the affidavit for publication may have been insufficient, we are unable to concur with the Supreme Court of Oklahoma in its conclusions. A publication of notice was in fact made, and a publication based upon an affidavit which, however defective it may have been, was intended to be in compliance with the statute. It was approved by the court, which upon it rendered a decree of foreclosure, which was executed by the proper officers in the proper way. By virtue of the proceedings the mortgagee was put into possession—a possession which he transferred to the appellant Harding. Under those circumstances what right has the appellee, a grantee from the mortgagor? The foreclosure was a proceeding in equity, although its various steps were prescribed by statute. Equitable principles must control the measure of relief. Even if the publication had been founded upon an affidavit perfect in form and the decree and all proceedings had been in strict conformity to the statute, yet by section 3955 the defendant would be let in to defend upon compliance with certain conditions.

Assuming that that section is not fully applicable because of the defect in the affidavit, yet the appellee comes into a court of equity seeking relief against the foreclosure of a mortgage. In such a case there are almost always certain conditions of relief. If the mortgage be valid the rights of the mortgagee and those claiming under him are to be protected. Generally such rights are protected by requiring payment of the mortgage debt and granting a right of redemption. It is true that this right of redemption is a favored right. (*Russell* v. *Southard*, 12 How. 139; *Villa* v. *Rodriguez*, 12 Wall. 323; *Bigler* v. *Waller*, 14 Wall. 297; *Noyes* v. *Hall*, 97 U. S. 34; *Shillaber* v. *Robinson*, 97 U. S. 68.) But it is only a right of redemption which in this case and under the facts disclosed the appellee is entitled to. She does not pretend in her affidavit that the mortgage was invalid, or that it had been paid. She claims by a deed subsequent to the mortgage, and simply insists that she has not had her day in court, and therefore her rights, which, so far as appears, are only the rights of redemption, have not been cut off. Harding, as the grantee of the purchaser at the foreclosure sale, stands in the shoes of the mortgagee. (*Bryan* v. *Brasius*, 162 U. S. 414.) As shown by the opinion in that case and cases cited therein a mortgagee who enters into possession, not forcibly but peacefully and under the authority of a foreclosure proceeding, cannot be dispossessed by the mortgagor, or one claiming under him, so long as the mortgage remains unpaid.

Under section 4498 the appellant Harding has all the rights of an occupying claimant, for he was "in quiet possession—claiming title—and holding—under a sale and conveyance made—in pursuance of—a decree

in chancery where lands—have been directed to be sold, and the purchasers thereof have obtained title to and possession of the same without any fraud or collusion." Of course, this section applies to proceedings which are defective, for if not defective, by section 3955 a purchaser in good faith has title and cannot be evicted upon any terms.

The decree of the Supreme Court of Oklahoma will be reversed and the case remanded to that court, with instructions to set aside the order of the trial court, and to direct the entry of one which, without disturbing the possession of Harding, will give to the appellee the right to appear, plead and make such defense as under the facts of the case and the principles of equity she is entitled to.

True copy.

Test:

*Clerk Supreme Court, U. S.*